No. 85-153

Office-Supreme Court, U.S.
FILED
JUL 27 1985
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

BALTIMORE GAS AND ELECTRIC COMPANY
AND BGE CORP,

Petitioners,

v.

FRANK O. HEINTZ, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

The basic question presented by this appeal is whether Section 24(e) of the Public Service Commission Law of Maryland, as interpreted and applied by the Commission in this case, imposes an unconstitutional burden on interstate commerce. More particularly, the question may be stated as follows:

> is it a violation of the Commerce Clause for the State of Maryland to prohibit a Maryland-chartered public utility, at all times and under any circumstances, to use the channels of interstate commerce to reorganize its capital structure by offering to exchange the shares of its common stock, which are listed on the New York Stock Exchange and owned by investors all over the United States, for shares in a holding company while at the same time leaving other utilities operating in Maryland free to effect such exchanges?

The District Court answered this question in the affirmative. The Court of Appeals for the Fourth Circuit, although conceding that the Maryland statute "does indeed burden interstate commerce," nevertheless held that the act was justified by a state interest in regulating and protecting the public from abuses associated with public utility holding companies.

The opinion of the Fourth Circuit raises the following specific questions to which definitive answers by this Court are clearly needed:

1. Did this Court, in deciding *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375 (1983), discard the distinction, most recently enunciated in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), between direct and indirect burdens on interstate commerce?

2. Does the Commerce Clause allow a state to enact a statute that directly interferes with interstate commerce by absolutely prohibiting a utility company, the common stock

of which is publicly traded, from offering a share-for-share exchange to be consummated through interstate facilities in order to establish a holding company structure?

3. Are statutory exceptions, which contradict a state interest that has been advanced to justify a statute's burden on interstate commerce, relevant to the Commerce Clause balancing test prescribed in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)?

4. In balancing a statute's burden on interstate commerce against the state interest that has been advanced to justify it, must a court consider whether the state interest could be promoted as well with a lesser impact on interstate commerce, as required by *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)?

PARTIES TO THE PROCEEDING BELOW

The Petitioners (Appellees below) are Baltimore Gas and Electric Company and BGE CORP, its proposed holding company parent. Baltimore Gas and Electric Company owns two-thirds of the outstanding capital stock, including one-half of the voting securities, of Safe Harbor Water Power Corporation. The Respondents (Appellants below) are Frank O. Heintz, William A. Badger, Lilo K. Schifter, Wayne B. Hamilton, and Haskell N. Arnold, who constituted the Public Service Commission of Maryland at the time suit was filed, and the Maryland People's Counsel, an attorney appointed by the Governor of Maryland to represent the interests of residential consumers in Commission proceedings, who intervened as an additional defendant and filed his own appeal to the Fourth Circuit which was consolidated with the Commission's appeal.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Baltimore Gas and Electric Company and BGE CORP petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this case on May 2, 1985.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix at pp. 1a-33a) is reported at 760 F.2d 1408. The opinion of the United States District Court for the District of Maryland (App. 34a-45a) is reported at 582 F. Supp. 675. The opinion of the Public Service Commission of Maryland (App. 47a-53a) is reported at LXXIV PSC Md. 217 (1983).

JURISDICTION

The judgment of the Court of Appeals was entered on May 2, 1985 and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 24(e) of The Maryland Public Service Commission Law, Article 78 of the Annotated Code of Maryland (1980 Replacement Volume) provides:

> No public service company shall take, hold, or acquire any part of the capital stock of any public service company of the same class, organized or existing under or by virtue of the laws of this State, without prior authorization by the Commission. No stock corporation of any description (except, with the authorization of the Commission, a company of the same class) shall take, hold or acquire more than ten percent of the total capital stock of any public service company organized or existing under or by virtue of the laws of this State, unless such stock is to be taken as collateral security and the Commission approves of its being so taken; and no such public service company shall be party to the violation of this subsection. For the purposes of this subsection, a company controlling a public service company shall be deemed a public service company of the same class as the controlled public service company.

Section 2(o) of The Public Service Commission Law provides in pertinent part:

> Two public service companies shall be considered of the same class, where they are both common carrier companies or both gas companies, electric companies, gas and electric companies, steam

heating companies, telephone companies, telegraph companies, water companies or sewage disposal companies.

STATEMENT OF THE CASE

Baltimore Gas and Electric Company ("BG&E") is an investor-owned public service company incorporated under Maryland law, engaged primarily in the business of supplying gas and electric service to customers in Baltimore and its surrounding metropolitan area. BG&E is one of the largest gas and electric utilities in the country; as of June 30, 1983, its outstanding common stock, listed on the New York Stock Exchange, consisted of 38,004,699 shares owned by 86,352 holders of record located throughout the United States; 26,401,556 of those shares, or approximately 70 percent, were registered in the names of holders located outside of the State of Maryland.

On October 22, 1982, BG&E's Board of Directors adopted an Agreement and Plan of Exchange for the establishment of a holding company structure by means of a share-for-share exchange of all of BG&E's outstanding common stock for that of a new Maryland corporation to be organized as the parent of BG&E in a holding company structure. BGE CORP was organized for that purpose but, at present, remains a corporate shell without business or properties of its own, and none of its shares of common stock has been issued. BG&E's Board of Directors determined that it was in the best interests of the company and its shareholders to establish a holding company structure in order to segregate within the company's corporate structure its utility and non-utility business activities, thereby facilitating the regulation of utility operations and the management of the total enterprise, as well as to provide a more rational means for further diversification into non-regulated activities that do not directly involve utility service to the public.

As the Fourth Circuit observed (App. 21a), because the "vast majority of BG&E stockholders are not Maryland resi-

dents" the Plan would be consummated "through the channels of interstate commerce." If the Plan were to proceed, upon the filing of proxy and registration statements with the Securities and Exchange Commission, BG&E and BGE CORP would solicit from all record holders of the outstanding common stock of BG&E proxies for the approval of the proposed share exchange in the following manner: proxy solicitation materials would be sent to each record holder of BG&E common stock through the U.S. mail; follow-up proxy materials would be sent to certain shareholders through the U.S. mail; telephone communications, both intrastate and interstate, would be used in connection with the solicitation of proxies from certain shareholders and to answer questions from shareholders; and proxy material and voting instruction requests would be sent to certain shareholders by various trustees, brokers and other nominees located both within and without the State of Maryland through the U.S. mail. The granting of proxies from shareholders and from trustees, brokers and other nominees back to BG&E would similarly be accomplished through the U.S. mail or other means of delivery crossing state lines.

On November 1, 1982, BG&E and BGE CORP filed a joint application with the Public Service Commission of Maryland requesting authority for BGE CORP to acquire, take and hold the common stock of BG&E pursuant to the Plan. Testimony and other evidence in support of and in opposition to the application was presented at three hearings. Then, on motion of the Maryland People's Counsel filed in the middle of the proceedings, the Commission, without consideration of the merits of the Plan, denied the application on the ground "that BGE CORP's proposed acquisition of 100 percent of BG&E's common stock is prohibited by the provisions of Section 24(e) of the PSC Law." (App. 53a). The Commission held that Section 24(e) absolutely prohibited the acquisition of more than 10 percent of the capital stock of a public service company incorporated under Maryland law by another corporation which is not already itself a "public service company of the same class" as the target company or which does not at the time of filing already control a "public service company of the same class" (App. 51a-53a).

Faced with that interpretation, under which BG&E is denied the opportunity to propose to its shareholders the establishment of a holding company structure, BG&E and BGE CORP filed this lawsuit in the United States District Court for the District of Maryland on July 15, 1983, alleging, among other things, that Section 24(e), as applied, violated the Commerce Clause by imposing a substantial direct, as well as indirect, burden on interstate commerce, primarily by denying BG&E's shareholders located throughout the country the opportunity to consider and vote on the Plan.[1]

There being no dispute as to any material fact, the District Court decided the case on the parties' cross motions for summary judgment, concluding that the application of Section 24(e) so as to prohibit shareholder consideration of the Plan imposed an unconstitutional burden on interstate commerce (App. 43a-45a). The Court first considered and rejected the state interest asserted by the Commission to rationalize Section 24(e)—controlling the formation of public utility holding companies to prevent certain "evils" associated with such companies—because the exceptions and irrational classifications contained in Section 24(e) obliterated the validity of that claim. Accordingly, the Court concluded

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[1] The jurisdiction of the District Court was invoked under: (i) 28 U.S.C. §1331 because the matter in controversy arose under the Constitution and laws of the United States; (ii) 28 U.S.C. §1337(a) because the action arose under an act of Congress regulating commerce; and (iii) 28 U.S.C. §1343(a)(3) and (4) because BG&E and BGE CORP sought declaratory and equitable relief to redress the deprivation, under color of state law, of rights secured by the Constitution and Civil Rights Act of 1871, 42 U.S.C. §1983. The complaint also alleged that Section 24(e) established a wholly arbitrary and irrational classification that had been selectively enforced in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment and that it conflicted with and was preempted by the Public Utility Holding Company Act of 1935 under the Supremacy Clause. Because the District Court decided the case on Commerce Clause grounds that Court declined to address the Equal Protection and Due Process issues, but did go on to state its view that Section 24(e) was not preempted by the Holding Company Act (App. 40a-45a). The Fourth Circuit concluded that Section 24(e) did not violate the Equal Protection, Due Process, or Supremacy Clauses. (App. 8a-19a).

that "the outright prohibition on the formation of holding companies such as BGE CORP serves no *legitimate* state interest" (App. 37a-40a) (emphasis supplied), the only state interest which could be conceived to support such an absolute prohibition being "the avoidance of the administrative costs which might be associated with PSC consideration of an application by BG&E and BGE CORP. . . ." (App. 45a).

Applying the balancing test prescribed in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), the District Court concluded that the burdens imposed on interstate commerce by Section 24(e)'s absolute prohibition of consideration of the Plan were excessive when measured against the purported state interest supporting Section 24(e) (App. 43a-45a). The Court found that the burdens on interstate commerce included "all those effects which naturally spring from the prohibition on reorganizing the company into a holding company structure: preventing the company from diversifying into areas outside the control of the PSC, affecting BG&E's ability to secure financing, [and] prohibiting BG&E's stockholders from exchanging their shares of BG&E for shares of BGE CORP" (App. 44a). The Court reasoned that its conclusion was compelled by the existence of a method through which the only legitimate state interest which could support Section 24(e) "could be promoted as well with a lesser impact on interstate activities" (quoting *Pike*, 397 U.S. at 142), by "a law which would allow the formation of public utility holding companies, but only on the approval of the PSC," rather than Section 24(e)'s peculiar prohibition, which applies regardless of the public interest merits of the proposed transaction (App. 45a).

The case was timely appealed to the United States Court of Appeals for the Fourth Circuit which reversed, concluding that the burdens imposed by Section 24(e) on interstate commerce (the same burdens described by the District Court) were outweighed by the state interest advanced to support that provision—controlling the formation of utility holding companies. The Fourth Circuit found that it was

unnecessary to consider whether that interest could be promoted as well with a lesser impact on interstate activities under *Pike* and considered and rationalized only one of the several exceptions and irrational classifications contained in Section 24(e) that contradict the purported state interest (App. 19a-33a).

REASONS FOR GRANTING THE PETITION

This Court should grant the petition in order to review and reverse the decision below so as to reaffirm and clarify the principles of Commerce Clause jurisprudence established in this Court's previous decisions. Petitioners have contended throughout this litigation that the case is controlled by *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) and *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The Fourth Circuit refused to apply what it described as the "analytically unsound and result-oriented" (App. 21a-22a) rule, explicitly stated in *Edgar* and other decisions, that a state statute which *directly* regulates or burdens interstate commerce is *per se* invalid under the Commerce Clause, specifically inviting this Court to resolve the "quandary" in which it found itself in trying to determine whether the direct burden test was still applicable (App. 20a). The Fourth Circuit noted that this case "squarely" presents "the question whether [this] Court has abandoned completely the distinction between direct and indirect burdens on interstate commerce for purposes of commerce clause analysis" (App. 20a).

Moreover, the Fourth Circuit misapplied *Edgar* and *Pike* in other important respects, and its opinion would establish a precedent for further departure from those decisions by other federal courts and cause confusion in the legal community over what standards are to be applied in analyzing Commerce Clause issues. It would also serve as precedent for the constitutionality of state statutes regulating transfers of control of public utilities, as well as of state statutes absolutely prohibiting the formation of public utility holding companies.

I.

The Court Of Appeals Refused To Apply The Direct Burden Rule Stated In *Edgar v. MITE*.

Edgar v. MITE involved the validity of the Illinois Business Take-Over Act, which regulated tender offers for shares of Illinois corporations by requiring registration with the secretary of state before the offers became effective and empowering him to block offers in certain circumstances. In an opinion by Justice White, the Court held that the Act violated the Commerce Clause because it imposed an indirect burden on interstate commerce that outweighed any state interests served by it. 457 U.S. at 643-46. Among the noted effects of the Act on interstate commerce was the deprivation of shareholders of a target corporation of the opportunity to receive interstate offers which, in turn, would generate interstate transactions, culminating in the sale of their shares at a premium. *Id.* at 640, 643.

Justice White, joined by the Chief Justice and Justices O'Connor and Stevens, further concluded that the Illinois Act violated the Commerce Clause because it imposed "a direct restraint on interstate commerce" by impeding the consummation of interstate securities transactions involving shareholders across the Country and abroad which, because they took place across state lines, "would themselves be interstate commerce." *Id.* at 640-43.

Here, the Fourth Circuit refused to consider the direct restraint imposed by the Maryland statute, avoiding what it characterized as an "analytically unsound and result-oriented approach" (App. 21a-22a).

Petitioners submit that Section 24(e) should be held unconstitutional under the direct burden rule stated in *Edgar* because it clearly interferes with and regulates interstate commerce in two ways. First, it prohibits a "stock corpora-

tion of any description"—whether it is a Maryland corporation or not—from acquiring more than 10 percent of the total capital stock of a Maryland public service company unless the acquiring corporation meets certain statutory criteria, thus directly interfering with the activities of corporations throughout the country that have no connection with Maryland. Second, as did the Illinois law at issue in *Edgar*, the Maryland statute impedes interstate securities transactions which, because they are consummated through interstate facilities and conducted across state lines, are themselves interstate commerce.

The Fourth Circuit conceded (App. 21a) that "Section 24(e) does indeed burden interstate commerce by limiting BG&E's ability to consummate a stock transaction having a substantial effect on interstate commerce. The vast majority of BG&E stockholders are not Maryland residents and would transfer their shares in BG&E for shares in BGE CORP through the channels of interstate commerce. BG&E is traded on the New York Stock Exchange, and thus the PSC's prohibition of the proposed share exchange has obvious consequences on interstate commerce. . . . [S]ection 24(e) erects an absolute bar to the consummation of what would otherwise be a legitimate interstate transaction."[2]

The reason the Fourth Circuit declined to follow the direct burden rule of *Edgar* was its belief that this Court had "indicated" in *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375 (1983) "that it may be no longer adhering to the direct/indirect distinction" in Commerce Clause cases, noting, nevertheless, that *Arkansas Electric* did not clearly establish that

[2] The significance of 70 percent of BG&E's shares being held out-of-state centers on the suggestion of this Court that a law which imposes burdens on out-of-state residents or businesses deserves heightened scrutiny. *See, e.g., Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 675-76 (1981) (plurality opinion of Powell, J.). If a state law affects persons lacking a voice in the state's political process the political checks on unduly burdensome regulation are reduced, if not eliminated. *Id.; see also South Carolina State Highway Dept. v. Barnwell Brothers*, 303 U.S. 177, 185 n.2 (1938).

this Court "has jettisoned" the direct burden analysis and had thus left the resulting "quandary . . . to be resolved explicitly by the Court" (App. 20a).

The Fourth Circuit's "quandary" reflected what Justice Rehnquist has called the "hopelessly confused" Commerce Clause jurisprudence. *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 706 (1981) (dissenting opinion). As previously noted, in the 1982 *Edgar v. MITE* decision, four Justices applied the direct burden analysis, following the Court's practice of many years in many previous cases.[3]

In *Arkansas Electric*, however, Justice Brennan, speaking for the Court on the validity of a state regulation that asserted authority over wholesale electric rates, found it "difficult to square the mechanical line drawn in [the prior line of cases,] based on a supposedly precise division between 'direct' and 'indirect' effects on interstate commerce, with the general trend in our Commerce Clause jurisprudence to look in every case to 'the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce.' " (quoting *Illinois Gas Co. v. Public Service Company*, 314 U.S. 498, 505 (1942)). The Court's analysis then proceeded under the indirect burden test stated in *Pike v. Bruce Church*, 461 U.S. at 393.

The concerns stated by Justice Brennan in *Arkansas Electric* as to the direct/indirect burden distinction can be said

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[3] *E.g., Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980) (the lower court "did not err in holding that" a Florida statute that prohibited out-of-state banks and bank holding companies from owning any business within the state that provided investment advisory services "directly burdens interstate commerce in a manner that contravenes" the Commerce Clause); *DiSanto v. Pennsylvania*, 273 U.S. 34, 37 (1927) (a Pennsylvania statute requiring the licensing of vendors selling tickets for passage abroad imposed an impermissable direct burden); *Seaboard Air Line Railway Co. v. Blackwell*, 244 U.S. 310, 315 (1917) (a Georgia statute requiring trains to slow down for every public crossing struck down, the Court explaining that "the power of the State cannot be exercised to directly burden interstate commerce.").

to restate those expressed by Justice Stone in his dissent in *DiSanto v. Pennsylvania*, 273 U.S. 34, 44 (1927): "too mechanical, too uncertain in its application, and too remote from actualities." Nevertheless, only in matters of state taxation has this Court explicitly rejected the direct/indirect approach in assessing Commerce Clause challenges, *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279-80, 288-89 (1977), and, regardless of the *Arkansas Electric* opinion, *Edgar v. MITE* continues to provide the basis for lower federal courts' application of the direct burden analysis. *E.g., Tousely v. North American Van Lines, Inc.*, 752 F.2d 96, 103 (4th Cir. 1985) (the Commerce Clause prohibits "direct state regulation of interstate commerce"); *ITCO Corporation v. Michelin Tire Corporation*, 722 F.2d 42, 48 n.9 (4th Cir. 1983) (state statute does not violate the Commerce Clause because it is not "an attempt directly to regulate interstate commerce . . ."), *cert. denied*, ___ U.S. ___, 105 S. Ct. 1191 (1985).

On the other hand, a different result may be observed in the District of Maryland. In *Bendix Corp. v. Martin Marietta Corp.*, 547 F. Supp. 522, 532 (D. Md. 1982), District Judge Joseph H. Young followed the direct burden rule stated in *Edgar* in holding unconstitutional a state corporate takeover statute because it "directly regulates transactions which take place across state lines." But, in his opinion below in this case he concluded that *Arkansas Electric*, handed down after his decision in the *Bendix* case, indicated that the Court had abandoned the direct burden test, so he declined to consider whether Section 24(e) imposed an invalid direct burden under *Edgar* (App. 43a).

One of the "special and important reasons" supporting the grant of a writ of certiorari in this case under Supreme Court Rule 17 is its presentation of "an important question of federal law which has not been, but should be, settled by this Court. . . ." As the Fourth Circuit stated, this case "squarely" presents "the question whether the Court has abandoned completely the distinction between direct and indirect burdens on interstate commerce for purposes of commerce clause analysis." (App. 20a). A plurality in *Edgar*

answered that question "no," while a majority in *Arkansas Electric* seemed to say "yes." This Court should provide a definitive answer if the lower courts are to be expected properly and consistently to interpret application of the Commerce Clause and if the legal community as a whole is to be afforded an appropriate degree of predictability in analyzing Commerce Clause issues.[4]

II.

The Court Of Appeals Misapplied *Edgar v. MITE* and *Pike v. Bruce Church, Inc.*

Even beyond, and regardless of, the direct/indirect burden issue, the Fourth Circuit's decision poses other important questions that should be answered by this Court. The Fourth Circuit decided the case under the indirect burden analysis of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), on which the majority opinion in *Edgar* was based, but in doing so it committed two fundamental errors, which, if not corrected, will lead to misapplication of both *Pike* and *Edgar* by other courts.

The Fourth Circuit decided that the burdens imposed by Section 24(e) on interstate commerce were outweighed by

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[4] Examples of cases in which this Court has granted certiorari because of confusion over questions such as that presented here include *Afroyim v. Rusk*, 387 U.S. 253, 255-256 (1967) (writ granted to reconsider a 10-year-old Supreme Court decision that had been decided by a five-to-four vote and was described as being "a source of controversy and confusion ever since," there having been "great doubt" cast upon the soundness of the earlier decision by subsequent Supreme Court rulings and "many commentators") and *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 47-49 (1977) (in which the Court, having granted certiorari to answer a question of antitrust law, noted that its own prior determination on the issue was in need of reconsideration since it "has been the subject of continuing controversy and confusion, both in the scholarly journals and in the federal courts," and the "great weight of scholarly opinion has been critical of the decision, and a number of the federal courts confronted with analogous vertical restrictions have sought to limit its reach").

the state's interest in controlling the formation of utility holding companies. However, in reaching that conclusion the Court ignored a number of the exceptions and irrational classifications contained in Section 24(e) which themselves plainly contradict the purported state interest. The Court also failed to consider whether the state interest advanced to support that section "could be promoted as well with a lesser impact on interstate activities" (*Pike*, 397 U.S. at 142).

In *Edgar v. MITE*, 457 U.S. at 644, this Court dismissed the state's asserted interest in protecting local stockholders as justification for its corporate takeover law because the law contained an exception that did not further that interest, that is, a provision which exempted from the law's coverage a corporation's purchase of its own shares. Following *Edgar*, the District Court below correctly concluded that based on *all* of the exceptions and irrational classifications contained in Section 24(e) "the outright prohibition on the formation of holding companies such as BGE CORP serves no *legitimate* state interest. . . ." (App. 40a) (emphasis supplied). The Fourth Circuit, however, ignored all but one of those exceptions and classifications and, therefore, misapplied *Edgar*.

As the District Court correctly held, there is no legitimate state interest that the imagination can conceive to justify the arbitrary and irrational classifications and exceptions contained in the statutory determination of who may and who may not acquire more than 10 percent of the stock of a Maryland public service company. Section 24(e), as applied by the Commission, provides that: a corporation which is itself a public service company of the same class, or which already controls such a public service company, may make such an acquisition with Commission approval. On the other hand, a corporation that does not yet control a public service company is absolutely prohibited from making such an acquisition, even if the acquisition would not adversely affect the public interest. Nothing in Section 24(e) prevents an individual, partnership, unincorporated association or other non-corporate entity or non-stock corporation from acquir-

ing any amount of the stock of a public service company regardless of the purpose of the acquisition or the qualifications of the purchasers. Similarly, nothing prevents even a corporation from acquiring any amount of the stock of a public service company which, although doing business in Maryland, is incorporated in another state (as are several that provide utility services in Maryland).

The central flaw in the Fourth Circuit's conclusion that Section 24(e) serves a legitimate state goal—the protection of Maryland ratepayers from the alleged abuses of holding companies—is that it ignores those arbitrary exceptions. A holding company that owned no other utilities could without *any* restriction under The Public Service Commission Law acquire all the stock of a Delaware corporation providing utility service in Western Maryland or on the Eastern Shore. But, under the same Law, such a holding company would be absolutely barred from acquiring more than 10 percent of the stock of BG&E, a Maryland corporation that distributes gas and electricity in Central Maryland. The Court, in reaching to find the state's "legitimate interest," ignored this senseless distinction. If the legislative goal is to protect the public in Maryland from the perceived abuses of holding companies, there is absolutely no justification why the law should freely allow a holding company to acquire a utility operating in one part of the state and flatly prohibit it from acquiring a utility providing the same type of service in another area of the state, the result depending merely but entirely upon the state of incorporation of the utility. The Court in its opinion passed over this difficulty without comment.

In its footnote 12, the Fourth Circuit (App. 25a) suggests that Section 24(e) may only apply to holding companies that are incorporated in Maryland. This, if correct, heightens the absurdity of the statute: what *legitimate* state goal can be served by a law that forbids a Maryland holding company from acquiring a Maryland utility but permits a Delaware (or Bahamian) holding company to do so? That Section 24(e) thus discriminates against Maryland, instead of foreign, corporations does not give it a stamp of validity, and the fact

remains that this law concededly imposes burdens on interstate commerce while serving *no* imaginably legitimate state goal.

The Fourth Circuit considered only *one* of the exceptions contained in Section 24(e) (*see* App. 31a) and ignored the rest. In this respect, the Fourth Circuit's opinion directly conflicts with that of the Sixth Circuit in *Martin Marietta Corp. v. Bendix*, 690 F.2d 558, 566 (6th Cir. 1982), in which that Court faithfully applied *Edgar* in rejecting protection of local stockholders as an interest justifying Michigan's takeover law because it contained an exception making it inapplicable to offers made by a company for its own stock. The Fourth Circuit's opinion thus raises the question whether this Court's ruling in *Edgar* that such exceptions must be considered in weighing a purported state interest is still good law. If the principles established in *Edgar* are to be rigorously applied rather than limited, this Court must review and correct the Fourth Circuit's decision in order to reaffirm those principles.

The Fourth Circuit also misapplied this Court's opinion in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), in which the Court held that a state interest advanced to support a statute that burdens interstate commerce must be examined to determine "whether it could be promoted as well with a lesser impact on interstate activities." The District Court's conclusion that Section 24(e) violated the Commerce Clause was based, in part, on the existence of a method through which the only legitimate state interest which could support Section 24(e) could be promoted as well with a lesser impact on interstate activities by "a law which would allow the formation of public utility holding companies, but only on the approval of the PSC," rather than Section 24(e)'s peculiar prohibition (App. 45a). The Fourth Circuit rejected this analysis because it read the "least restrictive means" component of the *Pike* test as being reserved for cases involving statutes shown to discriminate against out-of-state interests (App. 31a-32a).

The Fourth Circuit's decision thus establishes the precedent that in balancing a statute's burden on interstate commerce against the state interest advanced to justify it, a court need not make the evaluation within the confines of the "lesser restrictive means" test unless the statute discriminates against out-of-state interests. There is plainly no basis for such a limitation on the *Pike* test in *Pike* itself, 397 U.S. 142, which did *not* involve a discriminatory statute, nor in any other decision of this Court. To the contrary, the Court has applied the lesser restrictive alternative component of *Pike* in cases involving nondiscriminatory statutes. *E.g., Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 373, 376-77 (1976) (lesser burdensome alternatives were available to a state statute held violative of the Commerce Clause); *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36 (1980) (nondiscriminatory statute may survive balancing test "if it is narrowly drawn," citing *Pike*); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473-74 (1981) (alternative schemes would have been either more burdensome on commerce or less effective than the one adopted by the state).

Because the Fourth Circuit misapplied this Court's decisions in *Edgar* and *Pike* its decision, if it is allowed to stand, will be a precedent for further departures from and misapplications of those decisions by other courts.[5]

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[5] Indeed, Counsel for the Petitioners has been advised that the parties to litigation involving Commerce Clause issues similar to those in this case, *Norfolk Southern Corporation v. Oberly, et al.*, C.A. No. 84-330 MMS, currently pending before the United States District Court for the District of Delaware, have cited the decision below as precedent that it is unnecessary to consider whether a state interest advanced to support a challenged statute could be promoted as well by legislation with a lesser impact on interstate commerce, as expressly required by *Pike*.

III.

The Court Of Appeals' Decision Is A Precedent For The Constitutionality Of All State Statutes Regulating Transfer Of Control Of Public Utilities And Of Statutes Absolutely Prohibiting The Formation Of Public Utility Holding Companies.

This case has nationwide implications that go far beyond the frustration of BG&E's plan to change its corporate structure. Because the Fourth Circuit's decision upholds the constitutionality of a statutory prohibition on certain forms of control of Maryland public utilities on the basis that states have "a legitimate interest in regulating the structure of public utilities and their holding companies" (App. 28a), it may be used as a precedent for the constitutionality of any state statute regulating transfers of control of public utilities. A majority of the states have enacted such statutes.[6] Moreover, the Fourth Circuit's decision is a clear

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[6] Statutes regulating the sale of stock or other means of transferring control of public utilities have been enacted in the following 28 states, in addition to Maryland, and the District of Columbia: Alabama (ALA. CODE §§ 37-4-40 to -42 (1975)); Arizona (ARIZ. REV. STAT. ANN. § 40-285 (1974)); Arkansas (ARK. STAT. ANN. § 73-253 (1979 Repl. Vol.)); California (CAL. PUB. UTIL. CODE § 854 (West 1975)); Colorado (COLO. REV. STAT. § 40-5-105 (1984 Repl. Vol.)); Connecticut (CONN. GEN. STAT. ANN. §§ 16-43, -47 (West 1985 Supp.)); Delaware (DEL. CODE ANN. tit. 26, § 215 (1984 Supp.)); District of Columbia (D.C. CODE ANN. §§ 43-801 to -802 (1981)); Hawaii (HAWAII REV. STAT. §§ 269-17.5, -18, 416-33, 417E (1976 Repl. Vol. and 1982 Supp.)); Illinois (ILL. ANN. STAT. ch. 111-2/3, §§ 27, 29 (Smith-Hurd 1985 Supp.)); Indiana (IND. CODE ANN. § 8-1-2-83 [54-509] (1984 Supp.)); Maine (ME. REV. STAT. ANN. tit. 35, § 211 (1984 Supp.)); Massachusetts (MASS. ANN. LAWS Ch. 164, § 96 (Michie/Law Co-op (1985)); Minnesota (MINN. STAT. ANN. §§ 216B.50-.51 (West 1985 Supp.)); Nevada (NEV. REV. STAT. § 704.410 (1983)); New Hampshire (N.H. REV. STAT. ANN. §§ 374:30-:33 (1984)); New Jersey (N.J. STAT. ANN. §§ 48:2-51.1, :3-10 (West 1984-85 Supp.)); New Mexico (N.M. STAT. ANN. § 62-6-12 (West 1978)); New York (N.Y. PUB. SERV. LAW § 70 (West 1984 Supp.)); North Carolina (N.C. GEN. STAT. § 62-111 (1982 Repl. Vol.)); North Dakota (N.D. CENT. CODE ANN. §§ 49-04-05, -06 (1978 Repl. Vol.)); Ohio (OHIO REV. CODE ANN. § 4905.48 (1977 Repl. Vol.)); Oregon (OR. REV. STAT. § 757.480 (1983)); Rhode Island (R.I. GEN. LAWS § 39-3-24 (1984)); South Carolina (S.C. CODE ANN. § 58-27-1300 (Law. Co-

precedent for the constitutionality of a state statute that would simply prohibit the formation of public utility holding companies and it could encourage other states to enact such laws.

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op. 1976)); Texas (TEX. CIV. STAT. ANN. art. 1446c, § 63 (Vernon 1980)); Vermont (VT. STAT. ANN. tit. 30, §§ 301, 311 (1970)); Virginia (VA. CODE § 56-89 (1981)); Washington (WASH. REV. CODE ANN. §§ 80.12.020, .040 (1962 and 1985 Supp.)); West Virginia (W.VA. CODE § 24-2-12 (1984 Supp.)); and Wisconsin (WIS. STAT. ANN. § 196.80 (West 1984 Supp.)).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July, 1985

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-1308

Baltimore Gas and Electric Company
and BGE Corp., Appellees,

v.

Frank O. Heintz; William A. Badger;
Lilo K. Schifter; Wayne B. Hamilton;
and Haskell N. Arnold constituting
The Public Service Commission of Maryland, Appellants,
and
Maryland Office of People's Counsel,
Defendant.

No. 84-1402

Baltimore Gas and Electric Company
and BGE Corp., Appellees,

v.

Frank O. Heintz; William A. Badger;
Lilo K. Schifter; Wayne B. Hamilton;
and Haskell N. Arnold constituting
The Public Service Commission of Maryland,
Defendants,
and
Maryland Office of People's Counsel, Appellant.

Appeals from the United States District Court for the District of Maryland, at Baltimore. Joseph H. Young, District Judge. (C/A 83-2571)

Argued: December 7, 1984. Decided: May 2, 1985

Before RUSSELL and HALL, Circuit Judges, and DUPREE, United States District Judge for the Eastern District of North Carolina, sitting by designation.

RUSSELL, Circuit Judge:

This appeal arises out of Baltimore Gas & Electric Co.'s (BG&E) suit against Frank O. Heintz, William A. Badger, Lilo K. Schifter, Wayne B. Hamilton, and Haskell N. Arnold, the commissioners of the Maryland Public Service Commission (PSC),[1] seeking both a declaratory judgment that Md. Ann. Code art. 78 § 24(e) (1980) is unconstitutional and an injunction prohibiting the future enforcement of that section. BG&E is a public utility organized under Maryland law with its principal place of business in Baltimore City, Maryland. It primarily supplies gas and electricity to customers in Baltimore City, Maryland. It's common stock is publicly traded on the New York Stock Exchange, and at the time of suit, 70% of its outstanding shares were owned by stockholders outside the state of Maryland.

BG&E was joined in its suit by BGE CORP, a Maryland corporation formed specifically to become the parent company of BG&E. BG&E proposed a share for share exchange of all the outstanding BG&E stock for stock in BGE CORP. The stock of Resource & Property Management (RPM), a wholly-owned subsidiary of BG&E, would also have been transfered to BGE CORP. As a result, BG&E and RPM would have become separate, wholly owned subsidiaries of BGE CORP; the holders of BG&E common stock would have become the holders of BGE CORP common stock. BG&E's preference stock, First Mortgage Bonds, and other outstanding debt would have continued as obligations of BG&E. This share for share exchange of the stock of BG&E for the stock of BGE CORP was designed "to separate the utility and non-utility divisions of the company under the holding company structure, which would 'facilitate the regulation of utility operations' and allow the company's non-

[1] The PSC is authorized to "supervise and regulate all public service companies subject to its jurisdiction to assure their operation in the interest of the public and to promote adequate, economical, and efficient delivery of utility services in the state without unjust discrimination, giving consideration to the public safety, the economy of the state, the conservation of natural resources, and the preservation of environmental quality." Md. Ann. Code art. 78 § 56 (1980).

utility divisions to diversify into activities other than the distribution of gas and electricity, without being held accountable to the PSC." *Baltimore Gas & Elec. Co. v. Heintz*, 582 F.Supp. 675, 677 (D.Md. 1984).

BG&E and BGE CORP filed a joint application with the PSC requesting authorization for the latter company to acquire all the stock of the former. Pursuant to the Public Service Commission Law, Md. Ann. Code art. 78 § 20(a), the Commission appointed a panel to hold hearings on the proposed stock exchange. The People's Counsel, an attorney appointed by the Governor to represent residential consumers in Commission proceedings,[2] filed a motion to dismiss the Commission proceedings on the ground that art. 78 § 24(e) prohibited the proposed exchange. After various memoranda were filed and a hearing was held, the Commission held that the proposed transfer was prohibited by the statute. The PCS did not consider the merits of the proposed exchange because it interpreted section 24(e) to bar absolutely the exchange.

Despite the availability of state court review proceedings, *see* Md. Ann. Code §§ 89-98 (1980 & Supp. 1984), BG&E and BGE CORP challenged the constitutionality of section 24(e) in federal court. After BG&E filed a motion for summary judgment in its suit seeking declaratory and injunctive relief concerning the constitutionality of section 24(e) on the basis of the supremacy, commerce, due process, and equal protection clauses, the district court granted the People's Counsel motion to intervene as a defendant. People's Counsel and the PSC filed motions for summary judgment, and the Securities and Exchange Commission filed a memorandum as an *amicus curiae*. Various replies and responses were filed; and after a hearing on the cross motions, the district court held that section 24(e) unconstitutionally burdened interstate commerce in violation of the commerce clause. 582

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[2] The People's Counsel is appointed by the Governor with the advice and consent of the state Senate. The People's Counsel is authorized to appear before the Commission and the courts to represent the interests of residential and non-commercial users of public utilities. Md. Ann. Code art. 78 § 15 (1980).

F.Supp. at 681-82. Specifically, the district court ruled that "the ban resulting from the absolute prohibition of Section 24(e) is excessive in light of the less restrictive alternative—a law which would allow the formation of public utility holding companies, but only on the approval of the PSC." *Id.* at 682. Relying on the *amicus curiae* brief of the Securities and Exchange Commission as "persuasive," the district court held that section 24(e) was not pre-empted by the Public Utility Holding Company Act of 1935, (PUHCA) 15 U.S.C. § 79i(a)(2), which allows holding companies to be established and to acquire the stock of utilities with the approval of the SEC. The court determined that because section 24(e) was designed to protect rate payers, not investors, it did not conflict with the PUHCA, which was designed to control generally the activities of holding companies by subjecting them to extensive SEC regulations. *Id.* at 679-80. Finally, the district court declined to address BG&E's equal protection and due process claims.

From the judgment of the district court, the PSC and People's Counsel appeal, arguing that the district court incorrectly characterized the state's interest served by section 24(e) and that the court incorrectly balanced the state interest against the burden on interstate commerce. BG&E continues to rely on the commerce, equal protection, and due process clauses to argue that the statute is unconstitutional. In addition, it argues that section 24(e) violates the supremacy clause as it prohibits the execution of the full purposes and objectives of the PUHCA. Finding BG&E's contentions unpersuasive, we reject its attack on the constitutionality of section 24(e). Accordingly, we reverse the district court.

I

Our first task when addressing the constitutionality of any statute is to determine the appropriate construction of the statutory language. Neither the federal courts nor the Maryland courts have construed this statute previously. When construing a statute for the first time, courts look first to the statute's language, then to its legislative history,

and finally to the interpretation given the statute by those charged with administering it. *Brothers v. First Leasing*, 724 F.2d 789, 792 (9th Cir. 1984). Section 24 (e) provides:

> (e) *Holding, acquiring, etc., capital stock of public service company.*—No public service company shall take, hold, or acquire any part of the capital stock of any public service company of the same class, organized or existing under or by virtue of the laws of this State, without prior authorization by the Commission. No stock corporation of any description (except, with the authorization of the Commission, a company of the same class) shall take, hold or acquire more than ten per cent of the total capital stock of any public service company organized or existing under or by virtue of the laws of this State, unless such stock is to be taken as collateral security and the Commission approves of its being so taken; and no such public service company shall be party to the violation of this subsection. For the purposes of this subsection, a company controlling a public service company shall be deemed a public service company of the same class as the controlled public service company.

There is no Maryland legislative history interpreting section 24(e). The predecessor to the current statute was enacted in 1910, 1910 Md. Laws ch. 180 § 35. That enactment was codified at Md. Pub. Div. Laws art. 23 § 449 (1911) and provided that

> . . . No such corporation shall directly or indirectly acquire the stock or bonds of any other corporation incorporated for or engaged in, the same or similar business, or proposing to operate or operating under a franchise from the same or any other municipality, unless authorized to do so, by the Commission. Save where stock shall be transferred or held for the purpose of collateral security only with the consent of the Commission, no stock corporation of any description, domestic or foreign, other than a gas or electrical corporation, shall purchase or acquire, take or hold, more than ten per centum of the total capital stock issued by any gas cor-

poration or electrical corporation organized or existing under and by virtue of the laws of this state. Nothing herein contained shall be construed to prevent the holding of stock heretofore lawfully acquired.

This statute was recodified several times and combined with similar statutes governing common carriers. In 1955, the Public Service Commission Law of Maryland was revised by 1955 Md. Laws ch. 441; section 23 of chapter 441 contained the same language as the current version, but no legislative history exists for any of these versions or the version under consideration.

In the absence of legislative history construing the statute, the interpretation of the administrative agency charged with enforcing the statute, the meaning of which is at issue, is entitled to at least "respectful consideration." *Schwartz v. Roanes*, 495 F.2d 844, 853 (2nd Cir. 1974) (interpreting N.Y. Pub. Serv. Law § 107, McKinney's Consol. Laws c. 48, which prohibited a public utility from using public service revenues for non-operating expenses without the PSC's approval and reversing district court on basis of commission's opinion) (quoting *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 163 (1971)). *See also, Hart & Miller Islands v. Corps of Engineers*, 621 F.2d 1281, 1290 (4th Cir. 1980) (following "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong") (quoting *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 381 (1969)). Despite the substantial deference accorded an agency's interpretation, the courts retain the final say on the construction of a statute; and if the construction posited by the agency is inconsistent with the policy embodied in the statute, then the agency's construction must be rejected in favor of one more reasonable. *California v. Watt*, 668 F.2d 1290, 1302-03 (D.C. Cir. 1981) (per curiam); *United Food & Commercial Workers Int'l Union Local No. 576 v. N.L.R.B.*, 675 F.2d 346, 351 (D.C. Cir. 1982).

In this instance, the PSC's interpretation[3] of section 24(e) in the regulatory proceeding that was the initiative for the suit below is eminently reasonable and consistent with the plain wording of the statute; and for that reason, we find its interpretation of the statute persuasive and adopt it as our own. A public service company may acquire the capital stock of a Maryland public service company of the same class if the transaction is approved by the PSC. A stock corporation that is *not* a public service company may acquire more than ten per cent of the capital stock of a Maryland public service company only if the stock is taken as collateral security for a debt of the public service company and only if the transaction is approved by the PSC. Under no other circumstances may a stock corporation that is not a public service company acquire more than ten per cent of the stock of a Maryland public service company. A stock corporation that controls a public service company is deemed to be a public service company of the same class as the controlled company and can acquire the capital stock of a Maryland public service company of the same class as the controlled company. With this interpretation in mind, we turn to BG&E's challenges to the constitutionality of section 24(e).

II

Section 24(e) does not conflict with the PUHCA and thus does not violate the supremacy clause.[4] The test for determining whether a state statute violates the supremacy clause is well established. Congress may pre-empt state authority to legislate within a certain area by explicitly so

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[3] *In re Baltimore Gas & Elec. Co.*, 74 Md. PSC 249, Case No. 7695, Order No. 66273 (July 1, 1983).

[4] U.S. Const. art. VI, cl.2 states:
"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof. . . shall be the supreme Law of the Land. . . .

stating. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Congress may also implicitly pre-empt state authority to regulate within an entire area by creating a federal regulatory scheme the structure and purpose of which is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (quoted in *Pacific Gas & Elec. v. Energy Resources Comm'n*, 461 U.S. 190, 204 (1983); *Fidelity Federal Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982)).

BG&E does not assert that Congress has completely preempted state regulation of public utility holding companies, and such an argument would be patently unconvincing in light of the provisions in the PUHCA that expressly contemplate coordinate state and federal regulation. "[T]he purpose of section 11 [15 U.S.C. § 79k] is simply to provide a mechanism to create conditions under which effective Federal and State regulation will be possible. It is therefore the very heart of the title, the section most essential to the accomplishment of the purposes set forth in the President's message." S. Rep. 621, 74th Cong., 1st Sess., p. 11 (quoted in *North American Co. v. S.E.C.*, 327 U.S. 686, 704 n.14 (1946)). By adopting 15 U.S.C. § 79k(b)(1), which permits the S.E.C. to require a public utility holding company to divest geographically and economically unrelated holdings, Congress "hoped to rejuvenate local utility management and *to restore effective state regulation* . . . ." *North Am. Co. v. S.E.C.*, 327 U.S. at 704. *See also* 15 U.S.C. § 79h (states may prohibit, or otherwise regulate, a single company acquiring both a gas and an electric utility).

BG&E instead argues that the PUHCA preempts section 24(e) "because [section 24(e)] frustrates the accomplishment and execution of one of the purposes and objectives of the [PUHCA]—facilitating the continuance and creation of public utility holding companies within the regulatory framework created by that Federal Act when doing so is in the public interest—by making it impossible to establish a public utility holding company under Maryland law." BG&E supports its assertion that the PUHCA was designed to fa-

cilitate public utility holding companies by pointing out that Congress rejected the initial version of the bill that eventually became the PUHCA, which would have dissolved *all* public utility holding companies, and enacted instead a statute that regulated rather than eliminated public utility holding companies. Thus, asserts BG&E, because Congress decided to regulate rather than prohibit public utility holding companies, Maryland is prohibited from enacting a statute that would prohibit public utility holding companies. In other words, Congress considered the approach taken by Maryland and flatly rejected it; therefore, Maryland's approach is prohibited by the PUHCA.

The flaw in BG&E's argument is that Congress' rejection of a statute that would completely outlaw public utility holding companies does not necessarily establish that public utility holding companies cannot be prohibited by the states. Furthermore, 15 U.S.C. § 79k(b)(2) explicitly authorizes the S.E.C. to dissolve registered holding companies if it finds their continued existence performs no justifiable function and is an unnecessary complexity enabling the holding company to perpetuate a pyramided system of ownership. *American Power & Light Co. v. S.E.C.*, 329 U.S. 90, 104-06 (1946). Thus, as the PUHCA contemplates that the S.E.C. may prohibit only certain public utility holding companies, the question becomes whether the authority vested in the Maryland PSC "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress" in prohibiting certain public utility holding companies and permitting others. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

We hold that section 24(e) does not frustrate the purpose of the PUHCA. We find particularly persuasive the opinion of the S.E.C., presented in its *amicus* brief to the district court and incorporated in the PSC's brief to this Court. The S.E.C. asserts that section 24(e) is not pre-empted by the PUHCA because "Congress' decision to regulate rather than eliminate holding companies reflects a legislative judgment in favor of regulatory restraint, and not an intent to guarantee the proliferation of utility holding companies."

Congress' determination to do away with public utility holding companies unless certain conditions are met, *see* 15 U.S.C. § 79k(b)(1)(A)-(C) (holding company may continue if substantial economies will be secured; the controlled activites are geographically close; and localized management, efficient operation, and effective regulation will not be impaired), does not indicate a legislative intent that public utility holding companies shall be outside the reach of a prohibitory state statute. So long as the states are legislating constitutionally under other provisions of the Constitution, BG&E's contentions about which we shall soon speak, Congress' refusal to prohibit all public utility holding companies under the PUHCA does not pre-empt that legislation under the supremacy clause. Furthermore, the S.E.C. asserts that if BG&E were to apply to the S.E.C. for approval of the proposed transaction, it would deny the request on the basis of the PSC's order. In the face of this interpretation by the agency charged with administering the PUHCA, the claim that section 24(e) is pre-empted is clearly baseless.[5]

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[5] The cases cited by BG&E in support of its argument are not controlling. The basis for the preemption ruling in *NUI Corporation v. Kimmelman*, 593 F.Supp. 1457 (D.N.J. 1984), was that N.J. Stat. Ann. § 48:2-51.1 upsets the evenhanded approach to proxy solicitation between existing management and those who would seek control taken by section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n. The court specifically found that whereas section 14(a) of the federal act was an attempt "to neutralize any inherent situational advantages enjoyed by incumbent management by promoting equal and honest access to shareholders," the state statute, by requiring the challenger to obtain prior state approval of any attempt to take control of a public utility, impermissibly favored the incumbent management. BG&E attacked section 24(e) on the ground that it was preempted by the PUHCA; thus *NUI Corporation* is of no relevance. BG&E argues that it is relevant because it stands for the proposition that a "state law regulating the acquisition of a public utility cannot stand as an obstacle to the accomplishment and execution of the purposes and objectives of a Federal law." That may well be, but the state statute fell because it stood as an interference to the accomplishment of purposes of the securities laws, not because it interfered with federal regulation of public utilities. Thus, *NUI Corporation* is not only not controlling, but is not relevant to whether section 24(e) frustrates the purposes of the PUHCA.

III

BG&E argues that section 24(e) is unconstitutional under both the due process and equal protection clauses. Although we deem both arguments to be without merit, we feel compelled to address them briefly as the district court did not reach them. BG&E's arguments are that section 24(e) violates the equal protection clause because it arbitrarily and irrationally defines who may and who may not acquire more than ten per cent of the stock of a Maryland public service company. BG&E also asserts that section 24(e) has been applied so arbitrarily and selectively as to violate the due process and equal protection clauses. We address these contentions seriatim.

The basis for the equal protection attack is that the statute allows a stock corporation that controls a public service company to acquire more than ten per cent of a public utility if the PSC approves, while prohibiting entirely a stock corporation that does not control a public service company from acquiring a public service company. The statute in that manner distinguishes between stock corporations that control a public service corporation and those that do not when establishing the conditions under which a public service corporation may be acquired. If the stock corporation does not control a public service corporation, it may not, under any circumstances, acquire more than ten per cent of a public service corporation. If the stock corporation already controls a public service corporation of the same class as that which it proposes to acquire, then it may acquire more than ten per cent of the public service company if the PSC grants its approval. We are not persuaded that the legislative distinction between stock corporations that presently control a public service corporation and stock corporations that do not control public service corporations is wholly arbitrary and without a rational basis. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) (challenger bears burden of proving unconstitutionality).

Our review of the classification under the equal protection clause is two pronged: First we must determine whether the

challenged legislation has a legitimate purpose. Then, we must determine whether it was reasonable for the state legislature to believe that the classification would promote that purpose. *Western & Southern L.I. Co. v. Board of Equalization*, 451 U.S. 648, 668 (1981). Although BG&E does not distinguish between these two distinct questions, it argues that the classification is arbitrary (i.e., the statute has no legitimate purpose) and irrational (i.e., the Maryland legislature could not rationally believe that the classification chosen would achieve that purpose).

At the outset, we are mindful of the court's limited review of state legislative decisions:

> When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. [citation omitted] Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion or alienage, our decisions presume the constitutionality of statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude.

New Orleans v. Dukes, 427 U.S. 297, 303 (1976). *See also Western & S. L.I. Co.*, 451 U.S. at 670 (courts "not empowered to second-guess the wisdom of state policies"); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 464, 466, 469, 470 (the question for courts is whether the classification is a *rational* means of achieving state goal; not whether the classification *in fact* achieves that goal); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

There can be no doubt that the purpose of section 24(e) is legitimate. The primary justification for the state's authority to regulate public utilities under the police power, *see Bridgeport Hydraulic v. Council on Water Company Lands*,

453 F.Supp. 942, 951 (1977) *aff'd without opinion*, 439 U.S. 999 (1978), is to ensure continued fiscal responsibility and the ability of the utility to continue to render service in order to protect consumers of the public service company's product. *See Pacific Gas & Elec. v. Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 205-07 (1983). *Cf.* Note, *The Servicing Function of Public Utility Holding Companies*, 49 Harv. L. Rev. 957, 978-82 (1936) (documenting potential for abuse in holding company structure by over-charging for services). Section 24(e) is clearly intended to limit the formation of public utility holding companies; that purpose is certainly legitimate in light of the extensive regulation by the federal government and Congress' expectation in the PUHCA that the states would continue to exercise a certain amount of regulatory authority. Thus, the only remaining question is whether the state's classification of holding companies and absolute prohibition of one of those classes is a rational means toward eradicating the abuses that are inherent in the holding company structure.

The legislature could rationally conclude that in order to eliminate holding company abuse of public utilities no holding companies should be permitted to acquire a public utility unless that holding company already owns a public utility. By limiting the class of holding companies that are eligible to acquire a public utility to those companies that own public utilities and by subjecting those companies to public service commission review, the state ensures that it has an available record upon which to determine whether the proposed acquisition will create the potential for abuse. By prohibiting those holding companies that do not own public utilities from acquiring a public utility, the state further ensures that a holding company about which the state is unable to form a conclusion due to lack of information does not acquire a public utility. In addition, the legislative scheme recognizes that where a holding company already owns a utility of the same class, there are possible utilities of scale that may outweigh any detriment of the holding company structure. Thus the exception allows the PSC to consider whether those economies of scale outweigh the potential for

abuse in each particular case. If a holding company owns no other public utilities of the same class, however, there are no potential economies of scale; therefore, the state acted rationally in imposing an absolute bar.[6]

BG&E also challenges the application of section 24(e) to bar the proposed share exchange on the ground that the PSC has not consistently applied the statute thereby violating due process. We reject that argument. BG&E has cited several examples of what it claims are acquisitions of a public utility by a holding company that does not own a public utility of the same class. Because the PSC did not bar those substantially similar acquisitions on the basis of section 24(e), it is argued, it is an unconstitutional deprivation of due process (and equal protection) to prohibit BGE CORP's proposed acquisition of BG&E. The PSC urges us to analyze those other transactions and determine that they are not, in fact, substantially similar. Although the district court declined to rule on BG&E's due process argument, it did delve into the intricacies of the various acquisitions and determined that only one other transaction—the acquisition of the Allegheny Power System, Inc. by the Potomac Edison Company—that the PSC permitted to proceed was prohibited by the letter of the statute. 582 F.Supp. at 678. We find it difficult to perch a deprivation of due process upon so slender a reed, but that the statute has been applied nondiscriminatorily does not form the basis of our holding.

We hold that BG&E has failed to satisfy the elements of a claim of selective enforcement. It is a well-settled proposition of administrative law that when an agency deviates from established precedent, it must provide a reasoned ex-

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[6] The PUHCA also recognizes that economies of scale may outweigh the potential for abuse in the holding company structure when applied to public utilities. The Supreme Court has affirmed the SEC's interpretation of 15 U.S.C. § 79k(b)(1), which requires the holding company to show that an additional system cannot be operated under separate ownership without loss of economies so important as to cause serious economic impairment of the system. *SEC v. New England Elec. Sys.*, 384 U.S. 176 (1966). Thus, section 24(e)'s outright prohibition is consistent with the PUHCA, which generally prohibits public utility holding companies unless substantial economies of scale are shown to exist.

planation for its failure to follow its own precedents. The leading case is *Secretary of Labor v. United States*, 347 U.S. 645 (1954). This requirement does not mean that an agency may not change its policies, but rather that if the agency wishes to overrule or distinguish its precedents, it must explain why it has acted as it did. It follows from that general proposition that when an agency treats two similar transactions differently, an explanation for the agency's actions must be forthcoming. *Roadway Exp., Inc. v. N.L.R.B.*, 647 F.2d 415, 418-19 (1981); *Contractors Transp. Corp. v. United States*, 537 F.2d 1160, 1162 (1976).

But that general proposition is inapplicable to this case. That an agency is required to present a reasoned analysis when departing from established precedents is not required as a matter of constitutional due process, *see* W. Gellhorn, C. Byse, & P. Strauss, *Administrative Law* 393 (7th ed. 1979) but is required "so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate." *Topeka & Sante Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973). One legal basis for this requirement is the statutory requirement in the Administrative Procedure Act, 15 U.S.C. § 557 (c)(1984), that the agency provide "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion." *See Morton v. Ruiz*, 415 U.S. 199, 231-34 (1974). If the agency fails to fulfil this requirement, then it may be deemed to have acted arbitrarily. The problem with applying this analysis to the case *sub judice* is that this case is not a direct review of an agency action; BG&E declined to pursue judicial review in the Maryland courts. (Although the proceedings of the Maryland PSC are not subject to the Maryland Administrative Procedure Act, Md. Code State Gov't Ann. §§ 10-202(a)(3)(vii), 10-302(a)(7)(1984), the Maryland Public Service Commission Law provides for judicial review. Md. Code Ann. art. 78 § 89-98 (1980 & Supp. 1984)).

In order to prove a claim of selective enforcement sufficient to invalidate the actions of an administrative agency as violative of constitutional due process, BG&E must show

that the decision to bar its proposed stock exchange was based on some constitutionally impermissible criterion, such as race, sex, or exercise of first amendment rights. So long as an agency is not determining whether to enforce its regulations on the basis of some impermissible constitutional criterion, it is not violating the dictates of due process. The mere determination to enforce the statute or regulation in some cases and not to enforce in others, without more, may entitle one to an explanation from the agency designed to facilitate judicial review of the decision, but such an action does not constitute a deprivation of due process. That standard has "generated an almost unbroken line of cases upholding prosecutors' powers to decide who and how to charge." Vorenberg, *Decent Restraint of Prosecutorial Discretion*, 94 Harv. L. Rev. 1521, 1540 n.71 (1981) (citing cases). *See Wayte v. United States*, ___ U.S. ___, 53 U.S.L.W. 4319, 4322 (March 19, 1985) (claim of selective enforcement requires "show[ing] that government prosecuted *because of*" impermissible factors).

We emphasize that we need not determine what showing is necessary to establish a due process violation by virtue of discriminatory enforcement in a civil, administrative proceeding. The PSC has asserted, and BG&E has expressly accepted, that in those cases in which the PSC permitted a transaction that might have violated the statute to proceed, the section 24(e) ban on the acquisition of more than ten per cent of a public utility by a holding company not owning a public utility of the same class was neither presented to nor addressed by the commission. We hold only that in the absence of some showing of impermissible intent or motive on the part of the administrative agency charged with enforcing the law, the mere decision of the agency to enforce the law against an individual cannot support a claim of selective enforcement in an independent action challenging only the constitutionality of the statute.

"An agency generally cannot act against each technical violation of the statute it is charged with enforcing." *Heckler v. Chaney*, ___ U.S. ___, 53 U.S.L.W. 4385, 4387 (March 20, 1985). The agency possesses substantial discretion when

deciding whether to enforce or not to enforce a particular law in a particular circumstance, and the proper forum within which to review the exercise of that discretion is an appeal of the agency's decision to the appropriate court. *See Dunlop v. Bachowski*, 421 U.S. 560, 566-68 (1975) (setting aside decision of Secretary of Labor not to prosecute); *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584, 598 (D.C. Cir. 1971) ("Judicial review must operate to ensure that the administrative process itself will confine and control the exercise of discretion.") When the exercise of such agency discretion is challenged under the due process clause in an independent declaratory action regarding the constitutionality of the statute as applied in a particular instance, we are not reviewing the agency's decision on the basis of the administrative "arbitrary and capricious" standard that governs agency action. In order to set forth a constitutional claim, BG&E must show some influence of a constitutionally impermissible nature that caused the PSC to decide to enforce in this case or not to enforce in others.[7] BG&E admits that this is the first case in which the PSC has expressly considered the application of section 24(e); although other proposed transactions might have raised the issue, the question was never presented to or addressed by the PSC. That admission necessarily forecloses the showing of any impermissible motive, this being the first time the PSC has invoked the statute.

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[7] We emphasize that in judicial review proceedings, which would be governed by the arbitrary and capricious standard, BG&E would not be required to make any such showing. But in the procedural context of this case and where the state's action involves the vindication of societal or governmental interests rather than the protection of individual rights, the state's discretion is more properly judged by constitutional standards. *See Bachowski v. Brennan*, 502 F.2d 79, 87-88 (3d Cir. 1974) *rev'd sub.nom. Dunlop v. Backowksi*, 421 U.S. 560 (1975) (cited with approval at 421 U.S. at 567 n.7). *See also Marshall v. Jerrico, Inc.*, 446 U.S., 238, 249 (1980) (improperly motivated administrative enforcement decision subject to due process constraints).

IV

The final issue that we must address is BG&E's commerce clause[8] challenge to section 24(e). Although the commerce clause explicitly grants authority only to Congress, the Supreme Court long has held that the commerce clause limits the authority of the states to interfere with interstate commerce. *See South-Central Timber Development, Inc. v. Wunnicke*, ___ U.S. ___, ___, 81 L.Ed.2d 71, 76 (1984); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1852). Traditionally, the Supreme Court has applied a bifurcated test to determine whether a particular state enactment violates the commerce clause. For state statutes that *directly* regulate interstate commerce, the Court has formulated a virtual *per se* rule of invalidity. *See Edgar v. MITE Corp.*, 457 U.S. 624, 640 (1982) (plurality opinion of White, J., joined by Burger, C.J., Stevens, J., and O'Connor, J.); *see also South-Central Timber*, ___ U.S. at ___, 81 L.Ed. 2d at 85 (protectionist statute that burdens interstate commerce "falls within rule of virtual per se invalidity of laws that 'block the flow of interstate commerce at a State's borders.' *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)"). A state statute that seeks evenhandedly to effectuate a legitimate state interest and whose effects on interstate commerce are incidental has been generally upheld unless the burden on interstate commerce is clearly excessive in relation to the putative local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

In a recent opinion, however, the Court has indicated that it may be no longer adhering to the direct/indirect distinction. In *Arkansas Elec. Coop. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983), the Court, when evaluating the constitutionality of a state regulation that asserted the authority to regulate wholesale rates for the sale of electricity, stated that "it is difficult to square [a prior line of cases,] based on a supposedly precise division between 'di-

[8] The commerce clause, U.S. Const. art. 1 § 8 cl. 3, grants to Congress the power "[t]o regulate commerce . . . among the states."

rect' and 'indirect' effects on interstate commerce, with the general trend in our Commerce Clause jurisprudence to look in every case to 'the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce.' " 461 U.S. at 390 (quoting *Illinois Gas Co. v. Public Serv. Co.*, 314 U.S. 498, 505 (1942)). The Court has justified this new approach on the ground that the interests of the nation and the states often conflict in varying ways and to varying extents and that the most principled method of reconciling the competing interests is through an explicit balancing process.

The arguments of the parties in this appeal present us squarely with the question whether the Court has abandoned completely the distinction between direct and indirect burdens on interstate commerce for purposes of commerce clause analysis. BG&E argues that section 24(e) directly burdens interstate commerce, and is therefore virtually *per se* unconstitutional, and that section 24(e)'s indirect burden on interstate commerce is excessive in relation to the state interest served by the statute. The PSC urges us to recognize that the direct burden strand of the traditional commerce clause analysis has been abandoned and to apply only the general balancing test of *Pike v. Bruce Church, Inc.*

We decline to hold that the Supreme Court has jettisoned an established analytical framework for commerce clause analysis on the basis of *Arkansas Electric Coop.* Rather, we leave that quandary to be resolved explicitly by the Court[9].

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[9] That this approach is prudent is evidenced by the various academic attempts at resolving the "hopelessly confused" *(Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 706 (1981) (Rehnquist, J., dissenting)) commerce clause jurisprudence. *See, e.g.* Maltz, *How Much Regulation Is Too Much—An Examination of Commerce Clause Jurisprudence*, 50 Geo. Wash. L. Rev. 47 (1981) criticising *Pike* balancing approach because of difficulties of measurement of state's interest and suggesting "free location principle" as premise for commerce clause analysis); Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 Wis. C. R. 125 (1979) (criticising "isolation and incoherence" of commerce clause jurisprudence and suggesting analysis based upon political theory.) Furthermore, the court has explicitly and unanimously rejected the direct/indirect approach in one area of commerce clause jurisprudence—state taxation. *See Complete Auto Transit Inc. v. Brady*, 430 U.S. 274, 279-80, 288-89 (1977).

This case, however, illustrates the difficulties of applying the direct/indirect distinction. Section 24(e) does indeed burden interstate commerce by limiting BG&E's ability to consummate a stock transaction having a substantial effect on interstate commerce. The vast majority of BG&E stockholders are not Maryland residents and would therefore transfer their shares in BG&E for shares in BGE CORP through the channels of interstate commerce. BG&E is traded on the New York Stock Exchange, and thus the PSC's prohibition of the proposed share exchange has obvious consequences on interstate commerce.

Despite these obvious burdens, we are reluctant to characterize them as "direct" or "indirect." The burdens may be called "direct" in that section 24(e) erects an absolute bar to the consummation of what would otherwise be a legitimate interstate transaction. The burdens may also be called indirect in that section 24(e) is not designed to regulate share exchanges in interstate commerce which partially occur in Maryland, but is designed to protect Maryland consumers from the abuses inherent in the public utility holding company structure. Any consequences that flow from that attempt at consumer protection are incidental to the purpose of the statute and therefore indirect. BG&E recognizes in its brief to this Court that the burden on interstate commerce resulting from the consequential prohibition of stock transfers may be characterized as either direct or indirect. After arguing that the statute imposes a direct burden on interstate commerce, it states: "Moreover, the previously described *direct* burdens on interstate commerce also constitute substantial *indirect* burdens . . . ."

Of course, if we label the burden "direct," the result is practically foreordained: the statute is virtually *per se* unconstitutional. If we label the burden "indirect," then we must balance the state interest against the burden on the national interest in interstate commerce. Rather than engage in what we regard to be an analytically unsound and

result-oriented approach in this case[10], we hold that the test for the constitutionality of a state statute which is challenged under the commerce clause is as follows: "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. at 142; *see also South-Central Timber Development, Inc. v. Wunnicke*, __ U.S. at __, 81 L.Ed.2d at 85.

That we adopt this test does not necessarily imply that the direct/indirect distinction is no longer applicable to commerce clause analysis. When a state statute does not regulate evenhandedly, i.e., imposes on "out-of-state commercial interests the full burden" of pursuing even a legitimate state goal, or when "one State [attempts] to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade," the statute will be found to be virtually *per se* unconstitutional. *Philadelphia v. New Jersey*, 436 U.S. 617, 628 (1978).[11] *Cf. Bacchus Imports, Ltd. v. Dias*, __ U.S. __, __, 82 L.Ed.2d 200, 208-11

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[10] *Cf. DiSanto v. Pennsylvania*, 273 U.S. 34, 44 (1927) (Stone, J., dissenting) ("direct/indirect analysis" is "too mechanical, too uncertain in its application, and too remote from actualities, to be of value" and results in "using labels to describe a result rather than any trustworthy formula by which it is reached"). Justice Stone appears to have first articulated the now accepted balancing approach in *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767-69 (1945).

[11] "The opinions of the [Supreme Court] through the years have reflected an alertness to the evils of 'economic isolation' and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people. Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected. [citations omitted] The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders. [citation omitted] But where other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade, the Court has adopted a much more flexible approach, the general contours of which were outlined in *Pike v. Bruce Church, Inc. . . .*" *Philadelphia v. New York*, 437 U.S. at 623-24.

(1984) (striking down state statute exempting certain local alcoholic beverages from liquor tax as economic protectionism on ground that it was designed to discriminate in favor of local commodities). As the language quoted in the margin makes clear, *see supra* note 11, the requirement of evenhandedness preserves, albeit in a different formulation, the prohibition on direct burdens on interstate commerce. "Over the years the Court has used a variety of formulations for the Commerce Clause limitation upon the States, but it consistently has distinguished between outright protectionism and more indirect burdens on the free flow of trade. The Court has observed that 'where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.' [citation omitted] In contrast, legislation that visits its effects equally upon both interstate and local business may survive constitutional scrutiny if it is narrowly drawn." *Lewis v. B T Investment Managers, Inc.*, 447 U.S. 27, 36 (1980).

We find that section 24(e) regulates evenhandedly and is thus subject to the *Pike* balancing approach. The statute, in neither design nor effect, discriminates in favor of local commerce or against out-of-state commerce. There is no doubt that discriminatory state statutes that are enacted for protectionist purposes are consistently struck down, but an examination of those statutes indicates the dissimilarity of section 24(e) to those unconstitutional statutes. In *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981), the Court upheld a state statute banning the retail sale of milk in plastic non-returnable, non-refillable containers but permitting the sale in other non-returnable, non-refillable containers, such as paperboard cartons. Because the statute prohibited the sale of the plastic containers regardless of whether the milk, the container, or the seller was from inside or outside the state, the Court found the statute to regulate evenhandedly. In *Lewis v. B T Investment Managers, Inc.*, 447 U.S. 27, 44 (1980), the Court struck down as violative of the commerce clause a Florida statute that pro-

hibited investment advisory services by bank holding companies with principal offices outside the state. Although the Court declined to find the Florida statute *per se* invalid, finding instead that the disparate treatment of out-of-state bank holding companies could not be justified by legitimate local concerns, 447 U.S. at 42-44, the Court found the chief constitutional difficulty with the statute to be that it discriminated against out-of-state bank holding companies. Finding that discrimination "highly significant" for purposes of Commerce Clause analysis, the Court found that "discrimination against affected business organizations is *not* evenhanded because only banks, bank holding companies, and trust companies with principal operations *outside* Florida are prohibited from operating investment subsidiaries or giving investment advice within the state." 447 U.S. at 42 (emphasis in original). Because the statute "discriminates among affected business entities according to the extent of their contacts with the local economy", it "displays a local favoritism or protectionism that significantly alters its Commerce Clause status." *Id.*

The statute at issue here cannot be characterized as economic protectionism. It is not designed to favor local commerce over out-of-state commerce and imposes no burden on interstate commerce that it does not impose on intrastate commerce. Thus, we find that it regulates evenhandedly. Section 24(e) prevents the acquisition of more than ten per cent of the stock of only Maryland public service companies. Thus, as the district court found, "Maryland's own corporations are subjected to more profound restrictions than are

out-of-state corporations and economic protectionism is not an issue."[12] 582 F.Supp. at 681.

Finding that section 24(e) regulates evenhandedly, we must now determine whether the statute effectuates a legitimate state interest[13] and whether the burden imposed on

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[12] BG&E has asserted that section 24(e) directly burdens interstate commerce by prohibiting *foreign* corporations from acquiring Maryland corporations. Aside from our rejection of BG&E's argument that section 24(e) directly burdens interstate commerce, the short answer to BG&E's asserted burden is that BGE CORP is a Maryland corporation. Thus, the PSC is not applying section 24(e) to foreign corporations and no such burden is presented by the application of section 24(e) in this case.

Because we are reluctant to interpret a state statute when there is no guidance from either the state courts or state administrative agencies charged with enforcing the statute, we do not decide whether section 24(e) would apply to the acquisition of more than ten per cent of the stock of a Maryland public service corporation by a foreign corporation. We note, however, that when interpreting a statute virtually identical to the one at issue here, the Supreme Judicial Court of Massachusetts stated that only domestic corporations are forbidden to acquire more than ten per cent of a public utility's stock. *Flynn v. Commissioners of Dept. of Public Utilities*, 302 Mass. 131, __, 18 N.E.2d 538, 540 (1939). In *Steckler v. Pennroad Corp.*, 136 F.2d 197, *cert. denied*, 320 U.S. 757 (1943), the Third Circuit followed *Flynn* as to the interpretation of Mass. Gen. Laws Ann. ch. 156 § 5, but followed the plain meaning of a virtually identical New York statute, which explicitly applied to both domestic and foreign corporations. N.Y. Pub. Serv. Law § 54(2), *repealed* 1950 N.Y. Laws ch. 691, *reenacted* 1951 N.Y. Laws ch. 5, *currently codified* at N.Y. Pub. Serv. Law § 70 (1983).

[13] A preliminary argument raised by BG&E is that when balancing section 24(e)'s burden on interstate commerce against the state interest presented to justify it, we may consider only the weight of the interest that the Maryland legislators actually considered at the time that section 24(e) was originally enacted in 1910. BG&E allows that we may look either to the legislative history of the Maryland statute or the legislative history of the New York statute upon which section 24(e) is based. But in any event, BG&E argues, because the hazards and potential for abuse now associated with holding company ownership of public utilities was unknown at the time both the New York and Maryland statutes were passed, section 24(e) could not have been designed to prevent that abuse. Thus, there being no legitimate actual state interest to weigh in the balance, the statute must fall.

interstate commerce is excessive in light of that burden. We begin our analysis with an evaluation of the state interest protected by section 24(e). We have no doubt that the interest served is legitimate. The Supreme Court has stated that "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *Arkansas Electric*, 461 U.S. 375, 377 (1983). In this case, section 24(e) is but one subsection of an elaborate public service corporation law, one of the primary purposes of which is to regulate the rates charged to the public by the utility and which involves a balancing of the

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We find that it is unimportant for our analysis whether the Maryland legislators who enacted section 24(e) actually intended that it have the purposes we ascribe to it. Of course, when legislative history is available, it will be most helpful. *See e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981) (purpose of statute is actual purpose stated in legislative history, not purpose used to garner votes). But neither BG&E nor the PSC has cited us to any legislative records concerning the intent of the Maryland legislature when enacting section 24(e). "Where there is no evidence bearing on the actual purpose for a legislative classification, our analysis necessarily focuses on the suggestions of counsel." *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 682 n.3 (Brennan, J., concurring in judgment); *Id.* at 702-03 (Rehnquist, J., dissenting) (Supreme Court does not require a state to articulate a statute's purpose and may consider possible legislative purposes suggested by state's lawyers). *See also United States Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (where . . . . there are plausible reasons for [legislative] action, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision.' " (quoting *Flemming v. Nestor*, 363 U.S. 603, 612 (1960)). *But cf.* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv.L.Rev. 1, 43-47 (1972) (intermediate standard of equal protection review would encourage articulated legislative purposes and "safeguard [ ] the structure of the political process").

investor and consumer interests.[14] *Potomac Edison Co. v. Public Serv. Comm'n.*, 279 Md. 573, __, 369 A.2d 1035, 1041 (1977) (quoting *Power Comm'n v. Hope Gas Co.*, 320 U.S. 591, 603 (1944)). A necessary adjunct to ensuring the protection of consumers is the authority to regulate the corporate structure of public utilities, and this authority has been recognized as such by the Supreme Court. *Great Northern Ry. Co. v. Washington*, 300 U.S. 154, 160 (1937).

The potential for abuse of public service companies, which are only "legal" monopolies, are familiar and well documented. The primary purposes of the PUHCA were "to curb abusive practices of public utility companies by bringing them under effective control and to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce." *Gulf States Utilities Co. v. Federal Pwr. Comm'n*, 411 U.S. 747, 758 (1973). The legislative history of that statute recognizes, as do the commentators, that holding companies provide the occasion for deceptive financing practices, nondisclosure of important corporate accounts, and the manipulation of various "service charges" by the holding companies which increase the utility's costs and the ultimate charge to the con-

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[14] We emphasize that the very notion of a public service company presupposes "distinctive public constraints . . . administered by a government agency that supervises the availability and quality of the firm's services, the price to be charged for such services, and a number of ancillary matters, including the firm's financial practices, its relations with other public service companies, and mergers and other corporate changes." Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920*, 79 Colum. L.R. 426, 426 (1979). *But cf.* Jarrell, *The Demand for State Regulation of the Electric Utility Industry*, 21 J. L. & Econ. 269, *passim* (1978) (criticising "conventional rationale for regulation"—protection of public interest—and hypothesizing that state regulation is in economic interests of utilities); Posner, *Natural Monopoly and Its Regulation*, 21 Stan.L.Rev. 548, *passim* (1969) (natural monopoly not necessarily sufficient to justify state regulation).

sumer. *See* S.Rep. No. 621, 74th Cong., 1st Sess. 14; H.R. Rep. No. 1318, 74th Cong., 1st Sess. 5; Note, *The Servicing Function of Public Utility Holding Companies*, 49 Harv. L.Rev. 957, 978-82 (1936). Prior to the passage of the PUHCA, holding company systems routinely owned or operated subsidiaries in speculative non-utility enterprises, Ritchie, *Integration of Public Utility Holding Companies* 14 (1954), a particularly abusive practice at which section 24(e) is aimed. Against this background, it is clear that the state has a legitimate interest in regulating the structure of public utilities and their holding companies.[15]

BG&E argues that accepting the interest of the state in controlling the corporate structure of public utility holding companies, the state's interest "no longer has any validity" because all the potentials for abuse traditionally associated with holding companies have been remedied by either federal or state legislation. That argument proves too much. The state is entitled to exercise its police power in the manner it sees fit, so long as it is legislating constitutionally. That the state has enacted a complex regulatory structure with overlapping provisions, more than one of which may serve ultimately to control suspect activity, does not vitiate the state's otherwise legitimate interest in curbing such suspect activity. The state may regulate the rates utilities charge consumers either directly, by requiring commission approval of rate increases, or indirectly, by controlling certain investments and attempts at diversification by the utility. That is, the state may choose one or more means to a particular end, and the legitimacy of the end—the state in-

[15] For a discussion of the evils and abuses current prior to passage of the PUHCA, see generally, S. Doc. No. 92, Pt. 72A, 70th Cong., 1st Sess.; Buchanan, *The Public Utility Holding Company Problem*, 25 Calif. L. Rev. 517 (1937); Comment, *Federal Regulation of Holding Companies: The Public Utility Act of 1935*, 45 Yale L. J. 468 (1936).

terest served by the particular regulation—is not vitiated when the state chooses several means of achieving that end. To hold otherwise would permit a utility to choose which of several overlapping regulations with which it will comply and allow the utility to challenge as unconstitutional those that it finds unduly burdensome. Therefore, we hold that the legitimacy of the state's interest in preventing holding company abuse is not affected by other regulations that may achieve the same effect as section 24(e).

Having addressed the legitimacy of the state interest served by section 24(e), we now turn to the burden that that statute places on interstate commerce. We find that the district court correctly determined the burden section 24(e) places on interstate commerce.[16]

> The burden of Section 24(e) on interstate commerce includes all those effects which naturally spring from the prohibition on reorganizing the company into a holding company structure: preventing the company from diversifying into areas outside the control of the PSC, affecting BG&E's ability to secure financing, [and] prohibiting BG&E's stockholders from exchanging their shares of BG&E for shares of BGE CORP. 582 F.Supp. at 682.

At this point, however, our analysis departs from that of the district court. We find that this minimal burden on interstate commerce, necessitated by the very notion of control of a public utility's corporate structure and investments, is outweighed by the state's interest in protecting the consumers of the products of public utilities. The district court, "weigh[ing] the effect on interstate commerce against the state interest served by Section 24(e)[,]. . . . [found] that the burden on interstate commerce is excessive, particularly in light of the Court's finding . . . that the purported state interests could be 'promoted as well with a lesser impact on interstate activities.' " 582 F.Supp. at 681-82. The district

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[16] BG&E takes no exception to the district court's characterization of the statute's burden, and we find the district court's findings correct.

court characterized the burden on interstate commerce as "not so overwhelming . . . that the state Public Service Commission could not prohibit the formation of the holding company after a thorough study and reasoned decision, [but] the ban resulting from the absolute prohibition of Section 24(e) is excessive in light of the less restrictive alternative—a law which would allow the formation of public utility holding companies, but only on the approval of the PSC." 582 F.Supp. at 682. The evils associated by the PSC with the holding company structure could be addressed just as adequately through a permissive procedure in which PSC approval is required for the transfer of the assets from the regulated utility to the proposed holding company." *Id.* at 679-80.

As authority for this analysis, the district court and BG&E rely on three cases: *Edgar v. MITE Corp.*, 457 U.S. at 644; *Telvest v. Bradshaw*, 697 F.2d 576, 581 (4th Cir. 1983); and *Martin-Marietta Corp. v. Bendix*, 690 F.2d 558, 566 (6th Cir. 1982). Those cases all involve challenges to state anti-takeover legislation, and in each case, the statute was struck down as an impermissible burden on interstate commerce. *Edgar v. MITE Corp.*, 457 U.S. at 646 (opinion of White, J. joined by Burger, C.J., and Powell, J.);*id.* at 654-55 (Stevens, J., concurring in part and concurring in judgment); *id.* at 655 (O'Connor, J., concurring in part); *Telvest*, 697 F.2d at 582; *Martin-Marietta*, 690 F.2d at 568. The cited portions of these cases all deal with virtually identical statutory provisions. The three statutes were purported to protect investors from diminution of the value of their shares in a forced take-over. All three courts held that although this was a legitimate state objective, that objective was "diluted by," (*Telvest*, 697 F.2d at 581) "undermined by," (*Martin-Marietta*, 690 F.2d at 366-67) or "at variance with" (*Edgar*, 457 U.S. at 644) an exception in the statute for a corporation's acquisition of its own shares. That is, although the anti-takeover statutes were designed to protect shareholders, that protection was not provided when a corporation makes an offer for its own shares, because such corporation was not required to comply with any of the

state statute's formalities. Thus, the courts reasoned that if the statute did not protect shareholders from possible abuse in all the relevant circumstances, (that is, protect shareholders from an unfair purchase by outsiders and the corporation itself) then the statutory purpose was not truly served.

Contrary to the district court's reasoning, the statutory scheme of the Maryland public service law does not undermine the purported state interest in protecting consumers. Section 24(e) prohibits absolutely the acquisition of more than ten per cent of the shares of a public service company but it excepts from that prohibition an acquisition of more than ten per cent of the shares of a public service utility by a public utility holding company *that owns a public utility of the same class as that acquired so long as PSC approval is obtained prior to the acquisition.* That exception, unlike the exceptions in the anti-takeover statutes, is not at variance with or contrary to the asserted state interest in protecting the consumer of the goods and services provided by public utilities, because the transaction that would otherwise be subject to the statute is not completely exempted from the regulatory scheme. Rather, by requiring PSC approval prior to the consummation of the transaction, section 24(e) ensures the protection of the consumer in much the same way as an absolute ban. What the exception does is to allow the PSC to determine whether the potential for abuse present in holding company ownership of a public utility is outweighed by economies of scale or production when the acquiring public utility already owns a public utility of the same class. In this way, the statutory scheme protects the public from the potential for abuse in the holding company structure and at the same time recognizes that, in a limited context, the potential harm to consumers may be outweighed by other considerations—economies of scale or production. We are unprepared to hold that a statutory scheme that provides for consideration of countervailing factors when those factors may be applicable imposes an impermissible burden on interstate commerce.

An analysis of the final component—nondiscriminatory alternative—of the *Pike* balancing approach does not con-

vince us that section 24(e) is an unconstitutional burden on interstate commerce. "When discrimination against commerce . . . is demonstrated, the burden falls on the state to justify it both in terms of local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977). When as in this case, however, the challenged statute does not discriminate against interstate commerce but regulates evenhandedly, the court does not inquire strictly into whether alternate nondiscriminatory means of protecting the state interest are available. *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979); *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977). The choice among nondiscriminatory alternatives is a decision to be made by the state legislature. So long as the alternative chosen by the state does not discriminate against out of state commerce, then the court will not find the state's selection to be an unconstitutional burden on interstate commerce because other equally nondiscriminatory means of achieving the state's purpose exist. Only when the challenged statute in some way discriminates against interstate commerce will the court engage in an analysis of alternate means. *See Hughes v. Oklahoma*, 441 U.S. 322, 336-38 (1979) (invalidating statute prohibiting sale or transportation of Oklahoma minnows outside state, a statute "that most overtly discriminates against interstate commerce"); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350, 353-54 (1977) (invalidating statute requiring apples shipped in North Carolina be identified by only federal grade or no grade, a statute that "has the practical effect of not only burdening interstate sales of Washington apples, but also discriminating against them); *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951) (invalidating ordinance prohibiting sale of pasteurized milk unless pasteurized within five miles of city, an ordinance that "plainly discriminates against interstate commerce").

For a court to analyze alternative nondiscriminatory means when the state has chosen a means of achieving the

state's interest that is itself nondiscriminatory would be to do no more than substitute our judgment as to appropriate means for that of the state legislature. The alternative suggested by BG&E does not appear to be any less burdensome on interstate commerce. In fact, BG&E does not suggest an alternative to prohibiting the acquisition of more than ten per cent of the stock of a public utility by a Maryland holding company, but rather urges that before enforcing any such prohibition, it be given a hearing at which to argue that such an acquisition should be permitted. The ultimate burden in either case would be similar. Thus, we hold that BG&E has not shown an approach with a lesser impact on interstate commerce.

Accordingly, we conclude that the district court must be reversed. Section 24(e) is not pre-empted by the PUHCA. The statute does not violate the equal protection or due process clauses. And finally, the statute does not impose an unconstitutional burden on interstate commerce. The judgment of the district court is reversed and the case is remanded to the district court for entry of judgment in favor of the PSC and other appellants.

REVERSED
and
REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL NO. Y-83-2571

Baltimore Gas and Electric Company, et al.

v.

Frank O. Heintz, et al.

Filed: March 14, 1984

* * * * * *

YOUNG, United States District Judge

MEMORANDUM

The Baltimore Gas & Electric Co. (BG & E), a public utility supplying natural gas and electricity to Baltimore City and nine Maryland counties, has been stymied by the Maryland Public Service Commission (PSC) in its efforts to rearrange its corporate organization. The utility and its proposed holding company, BGE Corp., filed this declaratory judgment action seeking to have the state law under which the PSC acted (Md. Ann. Code art. 78, § 24(e)) declared unconstitutional or in conflict with federal law.

Having reviewed the numerous documents filed by the parties—including the intervening defendant People's Counsel of Maryland and an *amicus curiae* (the Securities and Exchange Commission)—and having conducted a hearing on the matter, the Court finds that Section 24(e), as applied to the plaintiffs, is unconstitutional, as it violates the Commerce Clause of the United States Constitution.

Facts

The factual allegations necessary for resolution of this case are undisputed, making disposition on the cross motions for summary judgment appropriate.

About seventy percent of the outstanding stock of BG & E is held by residents of states other than Maryland, making it clear that the securities of BG & E are commodities in interstate commerce.

The attempted reorganization of the utility began when BG & E incorporated its proposed holding company, called BGE Corp., and filed an application with the PSC to transfer all the assets of BG & E to the new holding company on the basis of a share-for-share exchange with the stockholders of the existing corporation. When the joint application of the utility and its proposed holding company was filed with the PSC in November, 1982, the announced reason for the reorganization was to separate the utility and non-utility divisions of the company under the holding company structure, which would "facilitate the regulation of utility operations" and allow the company's non-utility divisions to diversify into activities other than the distribution of gas and electricity, without being held accountable to the PSC.

The Maryland Public Service Commission appointed a panel which took evidence and heard argument on the application in three hearings (in January, March and April of 1983). Midway through the hearing process, the office of the Maryland People's Counsel, which represents the interests of consumers in regulatory proceedings and in litigation, filed a motion to dismiss based on Section 24(e), which prohibits certain types of public utility holding companies altogether, allows some with the approval of the PSC, and allows other even without the approval of the PSC. Specifically, Section 24(e) provides:

> No public service company shall take, hold, or acquire any part of the capital stock of any public service com-

> pany of the same class, organized or existing under or by virtue of the laws of this State, without prior authorization of the Commission. No stock corporations of any description (except, with the authorization of the Commission, a company of the same class) shall take, hold, or acquire more than ten percent of the total capital stock of any public service company organized under or by virtue of the laws of this State, unless such stock is to be taken as collateral security and the Commission approves of its being so taken; and no such public service company shall be party to the violation of this subsection. For the purposes of this subsection, a company controlling a public service company shall be deemed a public service company of the same class as the controlled public service company.

Although this entire provision is relevant because of the plaintiffs' equal protection claim, the portion of Section 24(e) which prevented BG & E's corporate reorganization mandates that "no stock corporation of any description" may acquire any significant portion of the stock of a utility which is a Maryland corporation, with one exception not relevant here. It should be noted that another exception to this outright prohibition allows a "company of the same class"—or a company engaged in providing the same type of service (*e.g.*, electricity or telephone service)—to acquire another company with PSC approval. Because the BGE Corp. was a "stock corporation" not already owning a utility company of the same class as BG & E, and because BG & E is a Maryland corporation, the Commission read the law as absolutely barring BGE Corp. from acquiring more than 10 percent of the stock of BG & E.

After a fourth hearing, the full commission rejected the joint application of BGE Corp. and BG & E on June 16, 1983. Shortly thereafter, the plaintiffs brought this declaratory judgment action.

The history of the application of Section 23(e) is important in view of the equal protection claim of the plaintiffs. The plaintiffs have cited a number of instances in which the PSC

allowed acquisitions of utility companies to take place, apparently in violation of the law. Indeed, the Commission acknowledged in its answer to the complaint that

> . . .there have been some instances in which the acquisition of the stock of a utility company by a holding company which does not already control a public service company of the same class has been approved by the Commission.

In the field of energy regulation, however, the plaintiffs cite only two examples of PSC approval of energy utilities held by holding companies which are not owners of other utilities in Maryland:

> (1) Columbia Gas of Maryland, Inc. (a Delaware corporation distributing gas to three Maryland counties) is a subsidiary of Columbia Gas Systems, Inc., also a Delaware corporation. It should be noted that this corporate organization is not a violation of the letter of Section 24(e), since the subsidiary utility is not a Maryland corporation.
>
> (2) Potomac Edison Company (a Maryland corporation which distributes electricity to parts of seven Maryland counties) is a subsidiary of the Allegheny Power System, Inc.

The defendants maintain—and it has not been disputed—that in those proceedings where acquisitions apparently in violation of Section 24(e) were approved, the PSC was not aware of Section 24(e), or if it was aware of the provisions of Section 24(e), the prohibition was not "expressly addressed and resolved by the Commission."

State Interest

The plaintiffs claim that Section 24(e) violates the Commerce clause of the United States Constitution, that its application to BG & E is a violation of the equal protection and due process clauses of the Constitution, and that it is an unlawful attempt by the state to legislate in an area which has been pre-empted by federal law. The validity of all three

challenges to Section 24(e) depends largely on whether the State of Maryland has a legitimate state interest which is rationally served by the prohibition contained in Section 24(e). Therefore, the state interest asserted by the defendants is a logical starting point.

The parties have expended considerable effort looking for and debating the state interest considered by the Maryland legislature when Section 24(e)'s predecessor was first enacted, in the early part of this century. The parties appear to agree that the law was lifted in its entirety from legislation approved in New York state, since portions of the New York law which could not be applicable in Maryland (at one point, the bill talked of regulatory "commissions," although Maryland had only one relevant commission) appear in the original bill approved by the Maryland legislature. The plaintiffs argue that there was no legitimate state interest when the bill which contained what is now Section 24(e) was approved, since the evils perceived in relation to utility holding companies in New York were absent from Maryland; indeed, they argue there were no utility holding companies in Maryland at that time.

The plaintiffs' argument is doubly flawed. First, even if the perceived evils were not present in Maryland at the time the legislation was enacted, the Maryland legislature could have legitimately feared that utility holding companies were a growing national trend, and could have acted to prohibit the companies from coming to Maryland before any of them were formed. The second problem is that, at least for the purposes of Equal Protection and Due Process analysis, it matters not what state interest the legislature announced for Section 24(e). The state interest to be weighed or examined by the Court is *any* ground which can be *conceived* of to justify the state law. *McDonald v. Board of Education*, 394 U.S. 802, 809 (1969). The reason for sanctioning this judicial creativity (in imagining an appropriate legislative purpose even where the legislative history shows none) is evident: if a law served no legitimate state interest when passed, but a legitimate state interest rationally served by the law has since appeared, it would be inane to require the legislature

to repeal the earlier law, and re-enact it with an announcement of the appropriate, legitimate state purpose.

Before discussing the state interest asserted in this case, it should be noted that the United States Supreme Court recently recognized that state governments, having granted utilities monopoly powers, have a particularly vital interest in regulating those companies.

> . . .the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States. *Arkansas Electric Cooperative Corp. v. Arkansas Public Commission*, 51 U.S.L.W. 802, 809 (1983).

In its attempt to justify the outright ban on certain types of holding companies, the Public Service Commission has noted the historical objections to holding company structures, including theories that they facilitate stock watering and similar forms of misfinancing, that they make corporate accounts unavailable to regulatory agencies and facilitate the manipulation of the various subsidiaries, and that, through the use of excessive "service charges," they are able to milk the subsidiaries, causing utilities to show increased expenses and requiring regulatory agencies to raise rates higher.

The plaintiffs argue that these purported grounds do not justify preventing the formation of utility holding companies, since the Commission has the ability under Maryland law to require answers to questions about most of these matters, and that it has the power—indeed the obligation—to approve or deny the sale of major assets. These other controls available to the PSC to curb possible abuses of the regulatory system do not completely vitiate the state's interest in preventing holding companies, however. A state could legitimately conclude that utilities would usually be more amenable to regulation if the regulatory commission is not forced to make these inquiries, to untangle finances or decipher transactions between a utility and its affiliates.

Nevertheless, this Court must examine the purported state interest in light of the exceptions made to the prohibition in Section 24(e). *Martin Marietta v. Bendix Corp.*, 690 F.2d 558, 567 (6th Cir. 1982). And here, an exception to the outright prohibition on utility holding companies weakens the asserted state interest.

Section 24(e) excuses from its outright prohibition those holding companies which already own utilities of the same class as the target utility, and allows those holding companies to acquire utilities with the approval of the PSC. It is difficult to envision how the state interest could be any different with regard to those holding companies which already own a utility. The defendants have argued that there may be certain efficiencies which would result from what essentially amounts to the merger of two utilities so that a state could logically excuse them from the absolute prohibition. However, efficiencies may also be present in the creation of a holding company structure where, as here, the holding company does not already own another utility. Here the asserted efficiencies would be that the utility is engaged in providing some services which are regulated, and seeks to expand into areas where regulation would be inappropriate.

Consequently, the Court finds that the state has a legitimate interest, expressed through Section 24(e), in controlling the formation of utility holding companies, but that the outright prohibition on the formation of holding companies such as BGE Corp. serves no legitimate state interest. The evils associated by the defendants with the holding company structure could be addressed just as adequately through a permissive procedure in which PSC approval is required for the transfer of the assets from the regulated utility to the proposed holding company. In such a proceeding, the PSC can examine the proposed structure to determine whether any efficiencies could result from the reorganization, and whether the perceived problems may actually result.

Pre-emption

Although the Court has determined that Section 24(e) is unconstitutional as it imposes a burden on interstate com-

merce in violation of the Commerce Clause, a discussion of the plaintiffs' pre-emption claim is appropriate before addressing the constitutional issue. The constitutional claim should be addressed last because a court should hesitate to address the constitutionality of a challenged statute if other grounds exist which would invalidate the law or its application.

> Where a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons. *Siler v. Louisville & Nashville R. Co.*, 213 U.S. 175, 193 (1909) cited in *Hagans v. Lavine*, 415 U.S. 528, 546 (1974).

The plaintiffs claim that Section 24(e) irreconcilably conflicts with the Public Utility Holding Company Act of 1935, 15 U.S.C. § 791(a)(2), and thus violates the Supremacy Clause of the United States Constitution, Art. VI., clause 2. The cited section of the Public Utility Holding Company Act allows a holding company to be established and to acquire the stock of utilities if approved by the Securities and Exchange Commission.

The standard to be applied by courts in determining whether a federal law has pre-empted state legislation which is being challenged was recited in *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26 (1977):

> The criterion for determining whether state and federal laws are so inconsistent that the state law must give way is firmly established in our decisions. Our task is "to determine whether, under the circumstances of this particular case, [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

There is not much precedent on the issue of whether a state law regulating utility holding companies conflicts with the federal act, which is not surprising in light of the plaintiffs' claim at oral argument that the Maryland law is the only one of its kind in the country and the defendants' acknowl-

edgement that it is one of only a handful of similar laws. At least one state court has held that the federal act pre-empts state regulation insofar as the state is attempting to protect *investors* in public utilities, but that court expressly emphasized it was limiting its finding of pre-emption to state laws which aim at investor protection.

> Based upon the foregoing decisions, and looking to the express language of sub-sections (b) and (e) of Section 10 of the Public Utility Holding Company Act of 1935 [15 U.S.C. § 79j(b), (e)], we believe that, *insofar as investor protection is concerned*, the Federal government has pre-empted the field and has caused the jurisdiction of the SEC to be exclusive to that extent in matters which came before the SEC under authority of the Public Utility Holding Company Act of 1935. *Ellis v. Illinois Commerce Comm'n.*, 255 N.E.2d 417, 421-422 (Ill. 1970) (emphasis in original).

In the context of protection of rate payers, however, this Court has determined that Section 24(e)'s outright prohibition on certain types of public utility holding companies is not contradictory to the "purposes and objectives of Congress" as expressed in the Public Utility Holding Company Act (PUHCA) of 1935. The plaintiffs have attempted to construe the legislative history of the federal act as showing a federal intent to "foster" holding companies. However, a clear reading of the Act indicates that Congress had no such purpose—rather, the Act was intended to bring the utility holding companies under control, and in those rare circumstances in which they were allowed to continue in existence, to be subject to extensive monitoring by the SEC.

Furthermore, the PUHCA is replete with provisions recognizing and honoring state regulation, so Congress could hardly have intended to abolish state controls. *See, e.g.*, 15 U.S.C. §§ 79f(b), 79i(b), 79g(g) and 79r(b).

The Court is also persuaded by the *amicus curiae* brief filed by the Securities and Exchange Commission. The mere fact that the SEC thinks that Section 24(e) is not pre-empted by the PUHCA of 1935 is persuasive, since the SEC

is charged with enforcement of the PUHCA, and the construction of a statute by the agency charged with its enforcement is entitled to deference, *Nat'l Labor Rel. Bd. v. Boeing Co.*, 412 U.S. 67, 75 (1973).

Commerce Clause

Having rejected the nonconstitutional challenge to the state law at issue, the Court must proceed to analyze the plaintiffs' constitutional claims.

The plaintiffs claim that Section 24(e) is a violation of the Commerce Clause of the United States Constitution, Art. 1, § 8, cl. 3, in that it imposes either a direct burden on interstate commerce or imposes an indirect burden which is excessive in relation to the state interest served by the law. The Court declines the plaintiffs' invitation to make a bright-line distinction between direct and indirect burdens. Rather, the relevant Supreme Court decisions indicate that a balancing test is more appropriate.

> Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. ...If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. *Pike v. Bruce Chruch, Inc.*, 397 U.S. 137, 142 (1970).

Indeed, in a more recent opinion, the Supreme Court indicated that the "supposedly precise division between 'direct' and 'indirect' effects on interstate commerce" was being

abandoned, noting that the general trend in "our more modern Commerce Clause jurisprudence" is to

> look in every case to "the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce." *Arkansas Electric Corporation v. Arkansas Public Commission*, 51 U.S.L.W. 4539, 4543 (May 16, 1983) citing *Illinois Gas Co. v. Public Service Co.*, 314 U.S. 498, 505 (1942).

Where the state law at issue discriminates against out-of-state products, services or entities in favor of those in state, there is a strong presumption of a violation of the Commerce Clause. As the Court stated in *Arkansas Electric*, the "most serious concern identified in *Bruce Church*" was "economic protectionism." 51 U.S.L.W. at 4544.

Section 24(e) applies only to the acquisition of stock in "public service companies. . .organized or existing under the laws of this State." In other words, Maryland's own corporations are subjected to more profound restrictions than are out-of-state corporations and economic protectionism is not an issue. Therefore, the Court must weigh the effect on interstate commerce against the state interest served by Section 24(e). Applying this balancing test, the Court finds that the burden on interstate commerce is excessive, particularly in light of the Court's finding, above, that the purported state interests could be "promoted as well with a lesser impact on interstate activities."

The burden of Section 24(e) on interstate commerce includes all those effects which naturally spring from the prohibition on reorganizing the company into a holding company structure: preventing the company from diversifying into areas outside the control of the PSC, affecting BG & E's ability to secure financing, prohibiting BG & E's stockholders from exchanging their shares of BG & E for shares of BGE Corp. While this burden on interstate commerce is not so overwhelming as to lead the Court to conclude—at least at this point—that the state Public Service Commission could not prohibit the formation of the

holding company after a thorough study and reasoned decision, the ban resulting from the absolute prohibition of Section 24(e) is excessive in light of the less restrictive alternative—a law which would allow the formation of public utility holding companies, but only on the approval of the PSC. The only state interest served by the legislature's absolute ban on holding companies in BGE Corp.'s situation is the avoidance of the administrative costs which might be associated with PSC consideration of an application by BG & E and BGE Corp., costs which could be avoided by an outright ban. However, the costs of such a procedure do not outweigh the burden on interstate commerce resulting from the absolute ban on public utility holding companies.

Having determined that the application of Section 24(e) to the plaintiffs violated the Commerce Clause, the Court need not reach the plaintiffs' Equal Protection and Due Process claims. Nor will the Court engage in the sensitive business of attempting to redraft Section 24(e) to meet Constitutional criteria. Rather, the Court finds that the reading of Section 24(e) to constitute an absolute ban on public utility holding companies, as applied to the plaintiffs in this case, is an unconstitutional infringement on interstate commerce.

Joseph H. Young

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Baltimore Gas and Electric Company, et al.

v.

Frank O. Heintz, et al.

CIVIL NO. Y-83-2571

Order

In accordance with the statements in the Memorandum attached hereto, it is this 14th day of March, 1984, by the United States District Court for the District of Maryland, ORDERED:

1. That the plaintiffs' motion for summary judgment BE, and the same IS, hereby GRANTED;
2. That judgment BE, and the same IS, hereby ENTERED in favor of the plaintiffs; and
3. That a copy of this Memorandum and Order be sent to all parties.

Joseph H. Young
United States District Judge

BEFORE THE
PUBLIC SERVICE COMMISSION
OF MARYLAND

Case No. 7686

Order No. 66254

In The Matter Of The Joint Application
Of Baltimore Gas And Electric Company
And BGE CORP
For An Order Authorizing BGE CORP
To Take And Hold The Common Stock Of
Baltimore Gas And Electric Company

On November 1, 1982, Baltimore Gas and Electric Company ("BG&E") and BGE CORP filed a joint application requesting Commission authorization for the latter company to acquire all of the common stock of the former company. The stated purpose for this corporate reorganization was to create a holding company structure which would segregate existing and future non-utility businesses from BG&E's utility operation.

On March 29, 1983, People's Counsel filed a Motion to Dismiss with prejudice the joint application of BG&E and BGE CORP. In its Motion, People's Counsel contends that the transaction for which the Joint Applicants seek Commission approval violates Section 24(e) of The Public Service Commission Law ("PSC Law").[1] A memorandum in opposition to People's Counsel's Motion was filed by the Joint Applicants on April 14, 1983 and a response to that memorandum was filed by People's Counsel on April 22, 1983. At

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[1] *Md. Ann. Code* art. 78, §24(e) (1980 Repl. Vol.).

the request of the Commission, supplemental memorandums in support of their respective positions were filed by BG&E and Staff; however, the Office of People's Counsel declined to take advantage of this opportunity to supplement its initial pleadings. Oral argument was heard by the Commission on May 18, 1983.

Discussion

As previously stated, the sole basis of People's Counsel's Motion to Dismiss is that the transaction which is proposed by the Joint Applicants (i.e., the acquisition of 100 percent of BG&E's common stock by BGE CORP) is proscribed by Section 24(e) of the PSC Law. That Section presently provides:

> No public service company shall take, hold, or acquire any part of the capital stock of any public service company of the same class, organized or existing under or by virtue of the laws of this State, without prior authorization by the Commission. No stock corporation of any description (except, with the authorization of the Commission, a company of the same class) shall take, hold or acquire more than ten percent of the total capital stock of any public service company organized or existing under or by virtue of the laws of this State, unless such stock is to be taken as collateral security and the Commission approves of its being so taken; and no such public service company shall be party to the violation of this subsection. For the purposes of this subsection, a company controlling a public service company shall be deemed a public service company of the same class as the controlled public service company.

A review of these provisions indicates the following concerning the acquisition of public utility stock: (1) a public service company may acquire the capital stock of another public service company of the same class if that transaction is approved by the Commission; (2) a stock corporation can acquire more than 10 percent of the capital stock of a public service company only if the stock is taken as collateral security and only if the transaction is approved by the Commission; and (3) a stock corporation which controls a public

service company is deemed a public service company of the same class as the controlled company and, therefore, can acquire, with the Commission's approval, the common stock of another public service company of the same class as the controlled company. With this in mind, we will now analyze the transaction in question to determine how it should be classified for purposes of Section 24(e).

Initially, it should be noted that no party contends that BGE CORP is presently a public service company. In this regard, Section 2(o) of the PSC Law[2] defines "public service company" as "a common carrier company, gas company, electric company, steam heating company, telephone company, telegraph company, radio common carrier, water company, sewage disposal company, and/or any combination thereof." Each of these entities is in turn defined throughout Section 2 and a review of those definitions clearly establishes that BGE CORP is not a public service company. As a result, its acquisition of BG&E's common stock does not appear to be on its face the acquisition of the common stock of a public service company by a public service company of the same class.

All of the parties also agree that BGE CORP is a stock corporation. As such, the final two sentences contained in Section 24(e) will determine whether or not the proposed acquisition is proscribed by that Section of the PSC Law. In this regard, the second sentence of that subsection unequivocally states that "no stock corporation . . . shall take, hold, or acquire more than ten percent of the total capital stock of any public service company . . . unless such stock is taken as collateral security and the Commission approves of its being so taken." Since BGE CORP is not taking BG&E's stock as collateral security, it would appear that BGE CORP is prohibited from acquiring all of the common stock of BG&E, as the joint application requests.

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[2] *Md. Ann. Code* art. 78, §2(o) (1980 Repl. Vol.).

However, the Joint Applicants maintain that this apparent prohibition is removed by the last sentence of Section 24(e) which provides:

> For the purposes of this subsection, a company controlling a public service company shall be deemed a public service company of the same class as the controlled public service company.

According to the Joint Applicants, since BGE CORP will control BG&E, it should be deemed a public service company of the same class and, therefore, it can acquire BG&E's common stock subject only to the approval of the Commission.

In view of the foregoing, it is apparent that the resolution of the issue which is before us will depend upon what interpretation is given to the language which is used in the last sentence of Section 24(e). In construing the meaning of that language, we will, of course, be guided by the principles of statutory construction which are set forth in various opinions of the Court of Appeals. As the Commission has stated in previous decisions,[3] it is a cardinal rule of statutory construction that statutes should always be construed to effectuate the intention of the legislature. See *Radio Communications, Inc. v. Public Service Commission*, 271 Md. 82, 93, 314 A.2d 118 (1974). Generally speaking, the intent of the legislature is to be found in the plain meaning of the language of the statute. See *Collier v. Connolley*, 285 Md. 123, 128 (1979). In this regard, the Court of Appeals noted in *Tax Commission v. Potomac Electric Power Company*, 182 Md. 111, 115 (1943):

> In ascertaining that intention, the court interprets the statute according to the ordinary and natural import of its language, unless a different meaning is clearly indicated by the context, *without resorting to subtle or forced interpretation for the purpose of extending or limiting its operation.* (emphasis supplied) See also *Baltimore County v. White*, 235 Md. 212, 218, 201 A.2d 358 (1964).

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[3] See, e.g., *Re J&W Utilities, Inc.*, Case No. 7571, Opinion and Order, pp. 3-5 (Md. Pub. Serv. Comm'n, April 4, 1983).

In our opinion, the ordinary and natural import of the language which is used in the last sentence of Section 24(e) inescapably leads to the conclusion that BGE CORP is precluded from acquiring more than 10 percent of the common stock of BG&E. This Section provides that ". . . a company *controlling* a public service company . . . shall be deemed a public service company" of the same class as the controlled company, not that a company that *will control* a public service company as a result of the stock acquisition shall be deemed a public service company of the same class. The use of the present tense of the verb "to control" is, we find, significant, for otherwise the prohibitions contained in this Section would have little, if any, meaning. The acceptance of the Joint Applicants' proposed interpretation of this Section would mean, for example, that any stock corporation could obtain more than 10 percent of the stock of a public service company provided that the interest so acquired is a controlling interest. As a result, the prohibition would only apply to the acquisition of more than 10 percent of the common stock of a public service company, but less than a controlling interest.[4] There is, we conclude, no reasonable justification for such a prohibition and, therefore, no reason to ignore the plain meaning of the language which has been used by the legislature and to adopt the forced and subtle interpretation proffered by the Joint Applicants.

Moreover, the Commission is unable to find any justification for departing from the literal meaning of the words used in Section 24(e) in order to give effect to what the Joint Applicants allege is the real intent of the legislature (i.e., not to absolutely prevent the reorganization of an existing public service company into a holding company structure).

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[4] Contrary to the arguments of the Joint Applicants, such an interpretation of Section 24(e) would not preclude a public service company, or a holding company, from acquiring the stock of a public service company of a different class, since once a controlling interest was obtained, it could be deemed a public service company of the same class.

As the Court of Appeals stated in *Clark v. Tawes*, 187 Md. 195, 199 (1946):

> We have no authority, in a case where the Legislature has spoken clearly, to distort its words and to usurp the function of the legislative branch of the government by making judicial law. It is true that real intent must prevail over literal intent. *State v. Petrushansky*, 183 Md. 67, 36 A.2d 533, and cases there cited. But that rule of construction is adopted only when the literal words of a statute say something that the Legislature could not possibly have meant. It does not apply when the only bases for a construction other than a literal one are either that the Legislature should not have said what it did, or that it would not have said it, had it been in possession of all the facts.

We do not believe that the literal meaning of the words used in Section 24(e) say something that the legislature could not have possibly meant. The fact that the legislature may have been primarily concerned with external acquisitions as opposed to internal corporate restructurings does not provide us with the authority to ignore the literal meaning of the words the legislature chose to use in Section 24(e).

In its exhaustively researched memorandum, the Joint Applicants have traced the development of the language which presently appears in Section 24(e) and have attempted to show that this statutory history, in conjunction with the past administrative practice of the Commission, requires an interpretation of the statute which will permit the formation of the proposed holding company structure. With respect to this argument, it should be noted that most of the examples of holding company ownership of public utilities cited by the Joint Applicants are distinguishable from the factual situation which is now before the Commission; for example, they involved the acquisition of public service companies by entities which already control a public service company of the same class. Moreover, in those in-

stances where the factual situation is similar, the Joint Applicants have failed to cite a case where the prohibitions contained in Section 24(e) were expressly addressed and resolved by the Commission. Finally, even if certain past decisions of the Commission are inconsistent with the statutory interpretation set forth in this decision, that fact does not provide us with the authority to ignore the clear mandate of Section 24(e).

Findings and Order

Based upon a careful review of the arguments of the parties with respect to People's Counsel's Motion to Dismiss, the Commission is of the opinion and so finds:

1. That BGE CORP is a stock corporation;
2. That BG&E is a public service company as that term is defined in Section 2(o) of the PSC Law;
3. That BGE CORP's proposed acquisition of more than 10 percent of BG&E's common stock is not for the purpose of obtaining collateral security; and
4. That BGE CORP does not control a public service company of the same class as BG&E.

Accordingly, we find that BGE CORP's proposed acquisition of 100 percent of BG&E's common stock is prohibited by the provisions of Section 24(e) of the PSC Law.

IT IS, THEREFORE, this 16th day of June, in the year Nineteen Hundred and Eighty-three, by the Public Service Commission of Maryland,

ORDERED: That the joint application which was filed by BGE CORP and Baltimore Gas and Electric Company on November 1, 1982 and which requests authorization for the former company to acquire 100 percent of the common stock of the latter is hereby denied and dismissed.

Haskell N. Arnold

Wayne B. Hamilton

Commissioners

Kirk J. Emge

Chief Hearing Examiner